2016-2345

VOLUME II OF II

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In The

United States Court of Appeals

For The Federal Circuit

IN RE: MAGNESITA REFRACTORIES COMPANY,

Appellant.

APPEAL FROM THE UNITED STATES PATENT AND TRADEMARK OFFICE, PATENT TRIAL AND APPEAL BOARD IN NOS. 77/873,477, 85/834,316.

JOINT APPENDIX

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H. R. 3450

One Hundred Third Congress of the United States of America

AT THE FIRST SESSION

Begun and held at the City of Washington on Tuesday, the fifth day of January, one thousand nine hundred and ninety-three

An Act

To implement the North American Free Trade Agreement.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE AND TABLE OF CONTENTS.

(a) SHORT TITLE.—This Act may be cited as the "North American Free Trade Agreement Implementation Act".

(b) TABLE OF CONTENTS.—

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Sec. 2. Definitions.

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Sec. 101. Approval and entry into force of the North American Free Trade Agreement.
Sec. 102. Relationship of the Agreement to United States and State law.
Sec. 103. Consultation and layover requirements for, and effective date of, proclaimed actions.
Sec. 104. Implementing actions in anticipation of entry into force and initial regulations.
Sec. 105. United States Section of the NAFTA Secretariat.
Sec. 106. Appointments to chapter 20 panel proceedings.
Sec. 107. Termination or suspension of United States-Canada Free-Trade Agreement.
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Sec. 209. Exchange of information.
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SEC. 2. DEFINITIONS.

For purposes of this Act:

(1) AGREEMENT.—The term "Agreement" means the North American Free Trade Agreement approved by the Congress under section 101(a).

(2) HTS.—The term "HTS" means the Harmonized Tariff Schedule of the United States.

(3) MEXICO.—Any reference to Mexico shall be considered to be a reference to the United Mexican States.

(4) NAFTA COUNTRY.—Except as provided in section 202, the term "NAFTA country" means—

(A) Canada for such time as the Agreement is in force with respect to, and the United States applies the Agreement to, Canada; and

(B) Mexico for such time as the Agreement is in force with respect to, and the United States applies the Agreement to, Mexico.

(5) INTERNATIONAL TRADE COMMISSION.—The term "International Trade Commission" means the United States International Trade Commission.

(6) TRADE REPRESENTATIVE.—The term "Trade Representative" means the United States Trade Representative.

TITLE I—APPROVAL OF, AND GENERAL PROVISIONS RELATING TO, THE NORTH AMERICAN FREE TRADE AGREEMENT

SEC. 101. APPROVAL AND ENTRY INTO FORCE OF THE NORTH AMERICAN FREE TRADE AGREEMENT.

(a) APPROVAL OF AGREEMENT AND STATEMENT OF ADMINISTRATIVE ACTION.—Pursuant to section 1103 of the Omnibus Trade and Competitiveness Act of 1988 (19 U.S.C. 2903) and section 151 of the Trade Act of 1974 (19 U.S.C. 2191), the Congress approves—

(1) the North American Free Trade Agreement entered into on December 17, 1992, with the Governments of Canada and Mexico and submitted to the Congress on November 4, 1993; and

(2) the statement of administrative action proposed to implement the Agreement that was submitted to the Congress on November 4, 1993.

(b) CONDITIONS FOR ENTRY INTO FORCE OF THE AGREEMENT.—The President is authorized to exchange notes with the Government of Canada or Mexico providing for the entry into force, on or after January 1, 1994, of the Agreement for the United States with respect to such country at such time as—

(1) the President—

(A) determines that such country has implemented the statutory changes necessary to bring that country into compliance with its obligations under the Agreement and has made provision to implement the Uniform Regulations provided for under article 511 of the Agreement regarding the interpretation, application, and administration of the rules of origin, and

(B) transmits a report to the House of Representatives and the Senate setting forth the determination under subparagraph (A) and including, in the case of Mexico, a description of the specific measures taken by that country to—

(i) bring its laws into conformity with the requirements of the Schedule of Mexico in Annex 1904.15 of the Agreement, and

(ii) otherwise ensure the effective implementation of the binational panel review process under chapter 19 of the Agreement regarding final antidumping and countervailing duty determinations; and

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(2) the Government of such country exchanges notes with the United States providing for the entry into force of the North American Agreement on Environmental Cooperation and the North American Agreement on Labor Cooperation for that country and the United States.

SEC. 102. RELATIONSHIP OF THE AGREEMENT TO UNITED STATES AND STATE LAW.

(a) RELATIONSHIP OF AGREEMENT TO UNITED STATES LAW.—

(1) UNITED STATES LAW TO PREVAIL IN CONFLICT.—No provision of the Agreement, nor the application of any such provision to any person or circumstance, which is inconsistent with any law of the United States shall have effect.

(2) CONSTRUCTION.—Nothing in this Act shall be construed—

(A) to amend or modify any law of the United States, including any law regarding—

(i) the protection of human, animal, or plant life or health,

(ii) the protection of the environment, or

(iii) motor carrier or worker safety; or

(B) to limit any authority conferred under any law of the United States, including section 301 of the Trade Act of 1974;

unless specifically provided for in this Act.

(b) RELATIONSHIP OF AGREEMENT TO STATE LAW.—

(1) FEDERAL-STATE CONSULTATION.—

(A) IN GENERAL.—Upon the enactment of this Act, the President shall, through the intergovernmental policy advisory committees on trade established under section 306(c)(2)(A) of the Trade and Tariff Act of 1984, consult with the States for the purpose of achieving conformity of State laws and practices with the Agreement.

(B) FEDERAL-STATE CONSULTATION PROCESS.—The Trade Representative shall establish within the Office of the United States Trade Representative a Federal-State consultation process for addressing issues relating to the Agreement that directly relate to, or will potentially have a direct impact on, the States. The Federal-State consultation process shall include procedures under which—

(i) the Trade Representative will assist the States in identifying those State laws that may not conform with the Agreement but may be maintained under the Agreement by reason of being in effect before the Agreement entered into force;

(ii) the States will be informed on a continuing basis of matters under the Agreement that directly relate to, or will potentially have a direct impact on, the States;

(iii) the States will be provided opportunity to submit, on a continuing basis, to the Trade Representative information and advice with respect to matters referred to in clause (ii);

(iv) the Trade Representative will take into account the information and advice received from the States under clause (iii) when formulating United

States positions regarding matters referred to in clause (ii); and

(v) the States will be involved (including involvement through the inclusion of appropriate representatives of the States) to the greatest extent practicable at each stage of the development of United States positions regarding matters referred to in clause (ii) that will be addressed by committees, subcommittees, or working groups established under the Agreement or through dispute settlement processes provided for under the Agreement.

The Federal Advisory Committee Act (5 U.S.C. App.) shall not apply to the Federal-State consultation process established by this paragraph.

(2) LEGAL CHALLENGE.—No State law, or the application thereof, may be declared invalid as to any person or circumstance on the ground that the provision or application is inconsistent with the Agreement, except in an action brought by the United States for the purpose of declaring such law or application invalid.

(3) DEFINITION OF STATE LAW.—For purposes of this subsection, the term "State law" includes—

(A) any law of a political subdivision of a State; and

(B) any State law regulating or taxing the business of insurance.

(c) EFFECT OF AGREEMENT WITH RESPECT TO PRIVATE REMEDIES.—No person other than the United States—

(1) shall have any cause of action or defense under—

(A) the Agreement or by virtue of Congressional approval thereof, or

(B) the North American Agreement on Environmental Cooperation or the North American Agreement on Labor Cooperation; or

(2) may challenge, in any action brought under any provision of law, any action or inaction by any department, agency, or other instrumentality of the United States, any State, or any political subdivision of a State on the ground that such action or inaction is inconsistent with the Agreement, the North American Agreement on Environmental Cooperation, or the North American Agreement on Labor Cooperation.

SEC. 103. CONSULTATION AND LAYOVER REQUIREMENTS FOR, AND EFFECTIVE DATE OF, PROCLAIMED ACTIONS.

(a) CONSULTATION AND LAYOVER REQUIREMENTS.—If a provision of this Act provides that the implementation of an action by the President by proclamation is subject to the consultation and layover requirements of this section, such action may be proclaimed only if—

(1) the President has obtained advice regarding the proposed action from—

(A) the appropriate advisory committees established under section 135 of the Trade Act of 1974, and

(B) the International Trade Commission;

(2) the President has submitted a report to the Committee on Ways and Means of the House of Representatives and the Committee on Finance of the Senate that sets forth—

(A) the action proposed to be proclaimed and the reasons therefor, and

(B) the advice obtained under paragraph (1);

(3) a period of 60 calendar days, beginning with the first day on which the President has met the requirements of paragraphs (1) and (2) with respect to such action, has expired; and

(4) the President has consulted with such Committees regarding the proposed action during the period referred to in paragraph (3).

(b) EFFECTIVE DATE OF CERTAIN PROCLAIMED ACTIONS.—Any action proclaimed by the President under the authority of this Act that is not subject to the consultation and layover requirements under subsection (a) may not take effect before the 15th day after the date on which the text of the proclamation is published in the Federal Register.

SEC. 104. IMPLEMENTING ACTIONS IN ANTICIPATION OF ENTRY INTO FORCE AND INITIAL REGULATIONS.

(a) IMPLEMENTING ACTIONS.—After the date of the enactment of this Act—

(1) the President may proclaim such actions; and

(2) other appropriate officers of the United States Government may issue such regulations;

as may be necessary to ensure that any provision of this Act, or amendment made by this Act, that takes effect on the date the Agreement enters into force is appropriately implemented on such date, but no such proclamation or regulation may have an effective date earlier than the date of entry into force. The 15-day restriction in section 103(b) on the taking effect of proclaimed actions is waived to the extent that the application of such restriction would prevent the taking effect on the date the Agreement enters into force of any action proclaimed under this section.

(b) INITIAL REGULATIONS.—Initial regulations necessary or appropriate to carry out the actions proposed in the statement of administrative action submitted under section 101(a)(2) to implement the Agreement shall, to the maximum extent feasible, be issued within 1 year after the date of entry into force of the Agreement; except that interim or initial regulations to implement those Uniform Regulations regarding rules of origin provided for under article 511 of the Agreement shall be issued no later than the date of entry into force of the Agreement. In the case of any implementing action that takes effect on a date after the date of entry into force of the Agreement, initial regulations to carry out that action shall, to the maximum extent feasible, be issued within 1 year after such effective date.

SEC. 105. UNITED STATES SECTION OF THE NAFTA SECRETARIAT.

(a) ESTABLISHMENT OF THE UNITED STATES SECTION.—The President is authorized to establish within any department or agency of the United States Government a United States Section of the Secretariat established under chapter 20 of the Agreement. The United States Section, subject to the oversight of the interagency group established under section 402, shall carry out its functions within the Secretariat to facilitate the operation of the Agreement, including the operation of chapters 19 and 20 of the Agreement and the work of the panels, extraordinary challenge committees, special committees, and scientific review boards convened under those chapters. The United States Section may not be considered to be an agency for purposes of section 552 of title 5, United States Code.

(b) AUTHORIZATION OF APPROPRIATIONS.—There are authorized to be appropriated for each fiscal year after fiscal year 1993 to the department or agency within which the United States Section is established the lesser of—

(1) such sums as may be necessary; or

(2) $2,000,000;

for the establishment and operations of the United States Section and for the payment of the United States share of the expenses of binational panels and extraordinary challenge committees convened under chapter 19, and of the expenses incurred in dispute settlement proceedings under chapter 20, of the Agreement.

(c) REIMBURSEMENT OF CERTAIN EXPENSES.—If, in accordance with Annex 2002.2 of the Agreement, the Canadian Section or the Mexican Section of the Secretariat provides funds to the United States Section during any fiscal year, as reimbursement for expenses by the Canadian Section or the Mexican Section in connection with settlement proceedings under chapter 19 or 20 of the Agreement, the United States Section may retain and use such funds to carry out the functions described in subsection (a).

SEC. 106. APPOINTMENTS TO CHAPTER 20 PANEL PROCEEDINGS.

(a) CONSULTATION.—The Trade Representative shall consult with the Committee on Ways and Means of the House of Representatives and the Committee on Finance of the Senate regarding the selection and appointment of candidates for the rosters described in article 2009 of the Agreement.

(b) SELECTION OF INDIVIDUALS WITH ENVIRONMENTAL EXPERTISE.—The United States shall, to the maximum extent practicable, encourage the selection of individuals who have expertise and experience in environmental issues for service in panel proceedings under chapter 20 of the Agreement to hear any challenge to a United States or State environmental law.

SEC. 107. TERMINATION OR SUSPENSION OF UNITED STATES-CANADA FREE-TRADE AGREEMENT.

Section 501(c) of the United States-Canada Free-Trade Implementation Act of 1988 (19 U.S.C. 2112 note) is amended to read as follows:

"(c) TERMINATION OR SUSPENSION OF AGREEMENT.—

"(1) TERMINATION OF AGREEMENT.—On the date the Agreement ceases to be in force, the provisions of this Act (other than this paragraph and section 410(b)), and the amendments made by this Act, shall cease to have effect.

"(2) EFFECT OF AGREEMENT SUSPENSION.—An agreement by the United States and Canada to suspend the operation of the Agreement shall not be deemed to cause the Agreement to cease to be in force within the meaning of paragraph (1).

"(3) SUSPENSION RESULTING FROM NAFTA.—On the date the United States and Canada agree to suspend the operation of the Agreement by reason of the entry into force between them of the North American Free Trade Agreement, the following provisions of this Act are suspended and shall remain suspended until such time as the suspension of the Agreement may be terminated:

"(A) Sections 204 (a) and (b) and 205(a).

"(B) Sections 302 and 304(f).
"(C) Sections 404, 409, and 410(b).".

SEC. 108. CONGRESSIONAL INTENT REGARDING FUTURE ACCESSIONS.

(a) IN GENERAL.—Section 101(a) may not be construed as conferring Congressional approval of the entry into force of the Agreement for the United States with respect to countries other than Canada and Mexico.

(b) FUTURE FREE TRADE AREA NEGOTIATIONS.—

(1) FINDINGS.—The Congress makes the following findings:

(A) Efforts by the United States to obtain greater market opening through multilateral negotiations have not produced agreements that fully satisfy the trade negotiating objectives of the United States.

(B) United States trade policy should provide for additional mechanisms with which to pursue greater market access for United States exports of goods and services and opportunities for export-related investment by United States persons.

(C) Among the additional mechanisms should be a system of bilateral and multilateral trade agreements that provide greater market access for United States exports and opportunities for export-related investment by United States persons.

(D) The system of trade agreements can and should be structured to be consistent with, and complementary to, existing international obligations of the United States and ongoing multilateral efforts to open markets.

(2) REPORT ON SIGNIFICANT MARKET OPENING.—No later than May 1, 1994, and May 1, 1997, the Trade Representative shall submit to the President, and to the Committee on Finance of the Senate and the Committee on Ways and Means of the House of Representatives (hereafter in this section referred to as the "appropriate Congressional committees"), a report which lists those foreign countries—

(A) that—

(i) currently provide fair and equitable market access for United States exports of goods and services and opportunities for export-related investment by United States persons, beyond what is required by existing multilateral trade agreements or obligations; or

(ii) have made significant progress in opening their markets to United States exports of goods and services and export-related investment by United States persons; and

(B) the further opening of whose markets has the greatest potential to increase United States exports of goods and services and export-related investment by United States persons, either directly or through the establishment of a beneficial precedent.

(3) PRESIDENTIAL DETERMINATION.—The President, on the basis of the report submitted by the Trade Representative under paragraph (2), shall determine with which foreign country or countries, if any, the United States should seek to negotiate a free trade area agreement or agreements.

(4) RECOMMENDATIONS ON FUTURE FREE TRADE AREA NEGOTIATIONS.—No later than July 1, 1994, and July 1, 1997, the President shall submit to the appropriate Congressional committees a written report that contains—

(A) recommendations for free trade area negotiations with each foreign country selected under paragraph (3);

(B) with respect to each country selected, the specific negotiating objectives that are necessary to meet the objectives of the United States under this section; and

(C) legislative proposals to ensure adequate consultation with the Congress and the private sector during the negotiations, advance Congressional approval of the negotiations recommended by the President, and Congressional approval of any trade agreement entered into by the President as a result of the negotiations.

(5) GENERAL NEGOTIATING OBJECTIVES.—The general negotiating objectives of the United States under this section are to obtain—

(A) preferential treatment for United States goods;

(B) national treatment and, where appropriate, equivalent competitive opportunity for United States services and foreign direct investment by United States persons;

(C) the elimination of barriers to trade in goods and services by United States persons through standards, testing, labeling, and certification requirements;

(D) nondiscriminatory government procurement policies and practices with respect to United States goods and services;

(E) the elimination of other barriers to market access for United States goods and services, and the elimination of barriers to foreign direct investment by United States persons;

(F) the elimination of acts, policies, and practices which deny fair and equitable market opportunities, including foreign government toleration of anticompetitive business practices by private firms or among private firms that have the effect of restricting, on a basis that is inconsistent with commercial considerations, purchasing by such firms of United States goods and services;

(G) adequate and effective protection of intellectual property rights of United States persons, and fair and equitable market access for United States persons that rely upon intellectual property protection;

(H) the elimination of foreign export and domestic subsidies that distort international trade in United States goods and services or cause material injury to United States industries;

(I) the elimination of all export taxes;

(J) the elimination of acts, policies, and practices which constitute export targeting; and

(K) monitoring and effective dispute settlement mechanisms to facilitate compliance with the matters described in subparagraphs (A) through (J).

SEC. 109. EFFECTIVE DATES; EFFECT OF TERMINATION OF NAFTA STATUS.

(a) EFFECTIVE DATES.—

(1) IN GENERAL.—This title (other than the amendment made by section 107) takes effect on the date of the enactment of this Act.

(2) SECTION 107 AMENDMENT.—The amendment made by section 107 takes effect on the date the Agreement enters into force between the United States and Canada.

(b) TERMINATION OF NAFTA STATUS.—During any period in which a country ceases to be a NAFTA country, sections 101 through 106 shall cease to have effect with respect to such country.

TITLE II—CUSTOMS PROVISIONS

SEC. 201. TARIFF MODIFICATIONS.

(a) TARIFF MODIFICATIONS PROVIDED FOR IN THE AGREEMENT.—

(1) PROCLAMATION AUTHORITY.—The President may proclaim—

(A) such modifications or continuation of any duty,

(B) such continuation of duty-free or excise treatment, or

(C) such additional duties,

as the President determines to be necessary or appropriate to carry out or apply articles 302, 305, 307, 308, and 703 and Annexes 302.2, 307.1, 308.1, 308.2, 300–B, 703.2, and 703.3 of the Agreement.

(2) EFFECT ON MEXICAN GSP STATUS.—Notwithstanding section 502(a)(2) of the Trade Act of 1974 (19 U.S.C. 2462(a)(2)), the President shall terminate the designation of Mexico as a beneficiary developing country for purposes of title V of the Trade Act of 1974 on the date of entry into force of the Agreement between the United States and Mexico.

(b) OTHER TARIFF MODIFICATIONS.—

(1) IN GENERAL.—Subject to paragraph (2) and the consultation and layover requirements of section 103(a), the President may proclaim—

(A) such modifications or continuation of any duty,

(B) such modifications as the United States may agree to with Mexico or Canada regarding the staging of any duty treatment set forth in Annex 302.2 of the Agreement,

(C) such continuation of duty-free or excise treatment, or

(D) such additional duties,

as the President determines to be necessary or appropriate to maintain the general level of reciprocal and mutually advantageous concessions with respect to Canada or Mexico provided for by the Agreement.

(2) SPECIAL RULE FOR ARTICLES WITH TARIFF PHASEOUT PERIODS OF MORE THAN 10 YEARS.—The President may not consider a request to accelerate the staging of duty reductions for an article for which the United States tariff phaseout period is more than 10 years if a request for acceleration with respect to such article has been denied in the preceding 3 calendar years.

(c) CONVERSION TO AD VALOREM RATES FOR CERTAIN TEXTILES.—For purposes of subsections (a) and (b), with respect to an article covered by Annex 300–B of the Agreement imported from Mexico for which the base rate in the Schedule of the United

States in Annex 300–B is a specific or compound rate of duty, the President may substitute for the base rate an ad valorem rate that the President determines to be equivalent to the base rate.

SEC. 202. RULES OF ORIGIN.

(a) ORIGINATING GOODS.—

(1) IN GENERAL.—For purposes of implementing the tariff treatment and quantitative restrictions provided for under the Agreement, except as otherwise provided in this section, a good originates in the territory of a NAFTA country if—

(A) the good is wholly obtained or produced entirely in the territory of one or more of the NAFTA countries;

(B)(i) each nonoriginating material used in the production of the good—

(I) undergoes an applicable change in tariff classification set out in Annex 401 of the Agreement as a result of production occurring entirely in the territory of one or more of the NAFTA countries; or

(II) where no change in tariff classification is required, the good otherwise satisfies the applicable requirements of such Annex; and

(ii) the good satisfies all other applicable requirements of this section;

(C) the good is produced entirely in the territory of one or more of the NAFTA countries exclusively from originating materials; or

(D) except for a good provided for in chapters 61 through 63 of the HTS, the good is produced entirely in the territory of one or more of the NAFTA countries, but one or more of the nonoriginating materials, that are provided for as parts under the HTS and are used in the production of the good, does not undergo a change in tariff classification because—

(i) the good was imported into the territory of a NAFTA country in an unassembled or a disassembled form but was classified as an assembled good pursuant to General Rule of Interpretation 2(a) of the HTS; or

(ii)(I) the heading for the good provides for and specifically describes both the good itself and its parts and is not further subdivided into subheadings; or

(II) the subheading for the good provides for and specifically describes both the good itself and its parts.

(2) SPECIAL RULES.—

(A) FOREIGN-TRADE ZONES.—Subparagraph (B) of paragraph (1) shall not apply to a good produced in a foreign-trade zone or subzone (established pursuant to the Act of June 18, 1934, commonly known as the Foreign Trade Zones Act) that is entered for consumption in the customs territory of the United States.

(B) REGIONAL VALUE-CONTENT REQUIREMENT.—For purposes of subparagraph (D) of paragraph (1), a good shall be treated as originating in a NAFTA country if the regional value-content of the good, determined in accordance with subsection (b), is not less than 60 percent where the transaction value method is used, or not less than

50 percent where the net cost method is used, and the good satisfies all other applicable requirements of this section.

(b) REGIONAL VALUE-CONTENT.—

(1) IN GENERAL.—Except as provided in paragraph (5), the regional value-content of a good shall be calculated, at the choice of the exporter or producer of the good, on the basis of—

(A) the transaction value method described in paragraph (2); or

(B) the net cost method described in paragraph (3).

(2) TRANSACTION VALUE METHOD.—

(A) IN GENERAL.—An exporter or producer may calculate the regional value-content of a good on the basis of the following transaction value method:

$$RVC = \frac{TV-VNM}{TV} \times 100$$

(B) DEFINITIONS.—For purposes of subparagraph (A):

(i) The term "RVC" means the regional value-content, expressed as a percentage.

(ii) The term "TV" means the transaction value of the good adjusted to a F.O.B. basis.

(iii) The term "VNM" means the value of nonoriginating materials used by the producer in the production of the good.

(3) NET COST METHOD.—

(A) IN GENERAL.—An exporter or producer may calculate the regional value-content of a good on the basis of the following net cost method:

$$RVC = \frac{NC-VNM}{NC} \times 100$$

(B) DEFINITIONS.—For purposes of subparagraph (A):

(i) The term "RVC" means the regional value-content, expressed as a percentage.

(ii) The term "NC" means the net cost of the good.

(iii) The term "VNM" means the value of nonoriginating materials used by the producer in the production of the good.

(4) VALUE OF NONORIGINATING MATERIALS USED IN ORIGINATING MATERIALS.—Except as provided in subsection (c)(1), and for a motor vehicle identified in subsection (c)(2) or a component identified in Annex 403.2 of the Agreement, the value of nonoriginating materials used by the producer in the production of a good shall not, for purposes of calculating the regional value-content of the good under paragraph (2) or (3), include the value of nonoriginating materials used to produce originating materials that are subsequently used in the production of the good.

(5) NET COST METHOD MUST BE USED IN CERTAIN CASES.—An exporter or producer shall calculate the regional value-content of a good solely on the basis of the net cost method described in paragraph (3), if—

(A) there is no transaction value for the good;

(B) the transaction value of the good is unacceptable under Article 1 of the Customs Valuation Code;

(C) the good is sold by the producer to a related person and the volume, by units of quantity, of sales of identical or similar goods to related persons during the six-month period immediately preceding the month in which the good is sold exceeds 85 percent of the producer's total sales of such goods during that period;

(D) the good is—

(i) a motor vehicle provided for in heading 8701 or 8702, subheadings 8703.21 through 8703.90, or heading 8704, 8705, or 8706;

(ii) identified in Annex 403.1 or 403.2 of the Agreement and is for use in a motor vehicle provided for in heading 8701 or 8702, subheadings 8703.21 through 8703.90, or heading 8704, 8705, or 8706;

(iii) provided for in subheadings 6401.10 through 6406.10; or

(iv) a word processing machine provided for in subheading 8469.10.00;

(E) the exporter or producer chooses to accumulate the regional value-content of the good in accordance with subsection (d); or

(F) the good is designated as an intermediate material under paragraph (10) and is subject to a regional value-content requirement.

(6) NET COST METHOD ALLOWED FOR ADJUSTMENTS.—If an exporter or producer of a good calculates the regional value-content of the good on the basis of the transaction value method and a NAFTA country subsequently notifies the exporter or producer, during the course of a verification conducted in accordance with chapter 5 of the Agreement, that the transaction value of the good or the value of any material used in the production of the good must be adjusted or is unacceptable under Article 1 of the Customs Valuation Code, the exporter or producer may calculate the regional value-content of the good on the basis of the net cost method.

(7) REVIEW OF ADJUSTMENT.—Nothing in paragraph (6) shall be construed to prevent any review or appeal available in accordance with article 510 of the Agreement with respect to an adjustment to or a rejection of—

(A) the transaction value of a good; or

(B) the value of any material used in the production of a good.

(8) CALCULATING NET COST.—The producer may, consistent with regulations implementing this section, calculate the net cost of a good under paragraph (3), by—

(A) calculating the total cost incurred with respect to all goods produced by that producer, subtracting any sales promotion, marketing and after-sales service costs, royalties, shipping and packing costs, and nonallowable interest costs that are included in the total cost of all such goods, and reasonably allocating the resulting net cost of those goods to the good;

(B) calculating the total cost incurred with respect to all goods produced by that producer, reasonably allocating the total cost to the good, and subtracting any sales promotion, marketing and after-sales service costs, royalties, shipping and packing costs, and nonallowable interest costs that are included in the portion of the total cost allocated to the good; or

(C) reasonably allocating each cost that is part of the total cost incurred with respect to the good so that the aggregate of these costs does not include any sales promotion, marketing and after-sales service costs, royalties, shipping and packing costs, or nonallowable interest costs.

(9) VALUE OF MATERIAL USED IN PRODUCTION.—Except as provided in paragraph (11), the value of a material used in the production of a good—

(A) shall—

(i) be the transaction value of the material determined in accordance with Article 1 of the Customs Valuation Code; or

(ii) in the event that there is no transaction value or the transaction value of the material is unacceptable under Article 1 of the Customs Valuation Code, be determined in accordance with Articles 2 through 7 of the Customs Valuation Code; and

(B) if not included under clause (i) or (ii) of subparagraph (A), shall include—

(i) freight, insurance, packing, and all other costs incurred in transporting the material to the location of the producer;

(ii) duties, taxes, and customs brokerage fees paid on the material in the territory of one or more of the NAFTA countries; and

(iii) the cost of waste and spoilage resulting from the use of the material in the production of the good, less the value of renewable scrap or by-product.

(10) INTERMEDIATE MATERIAL.—Except for goods described in subsection (c)(1), any self-produced material, other than a component identified in Annex 403.2 of the Agreement, that is used in the production of a good may be designated by the producer of the good as an intermediate material for the purpose of calculating the regional value-content of the good under paragraph (2) or (3); provided that if the intermediate material is subject to a regional value-content requirement, no other self-produced material that is subject to a regional value-content requirement and is used in the production of the intermediate material may be designated by the producer as an intermediate material.

(11) VALUE OF INTERMEDIATE MATERIAL.—The value of an intermediate material shall be—

(A) the total cost incurred with respect to all goods produced by the producer of the good that can be reasonably allocated to the intermediate material; or

(B) the aggregate of each cost that is part of the total cost incurred with respect to the intermediate material that can be reasonably allocated to that intermediate material.

(12) INDIRECT MATERIAL.—The value of an indirect material shall be based on the Generally Accepted Accounting Principles applicable in the territory of the NAFTA country in which the good is produced.

(c) AUTOMOTIVE GOODS.—

(1) PASSENGER VEHICLES AND LIGHT TRUCKS, AND THEIR AUTOMOTIVE PARTS.—For purposes of calculating the regional value-content under the net cost method for—

(A) a good that is a motor vehicle for the transport of 15 or fewer persons provided for in subheading 8702.10.00 or 8702.90.00, or a motor vehicle provided for in subheadings 8703.21 through 8703.90, or subheading 8704.21 or 8704.31, or

(B) a good provided for in the tariff provisions listed in Annex 403.1 of the Agreement, that is subject to a regional value-content requirement and is for use as original equipment in the production of a motor vehicle for the transport of 15 or fewer persons provided for in subheading 8702.10.00 or 8702.90.00, or a motor vehicle provided for in subheadings 8703.21 through 8703.90, or subheading 8704.21 or 8704.31,

the value of nonoriginating materials used by the producer in the production of the good shall be the sum of the values of all nonoriginating materials, determined in accordance with subsection (b)(9) at the time the nonoriginating materials are received by the first person in the territory of a NAFTA country who takes title to them, that are imported from outside the territories of the NAFTA countries under the tariff provisions listed in Annex 403.1 of the Agreement and are used in the production of the good or that are used in the production of any material used in the production of the good.

(2) OTHER VEHICLES AND THEIR AUTOMOTIVE PARTS.—For purposes of calculating the regional value-content under the net cost method for a good that is a motor vehicle provided for in heading 8701, subheading 8704.10, 8704.22, 8704.23, 8704.32, or 8704.90, or heading 8705 or 8706, a motor vehicle for the transport of 16 or more persons provided for in subheading 8702.10.00 or 8702.90.00, or a component identified in Annex 403.2 of the Agreement for use as original equipment in the production of the motor vehicle, the value of nonoriginating materials used by the producer in the production of the good shall be the sum of—

(A) for each material used by the producer listed in Annex 403.2 of the Agreement, whether or not produced by the producer, at the choice of the producer and determined in accordance with subsection (b), either—

(i) the value of such material that is nonoriginating, or

(ii) the value of nonoriginating materials used in the production of such material; and

(B) the value of any other nonoriginating material used by the producer that is not listed in Annex 403.2 of the Agreement determined in accordance with subsection (b).

(3) AVERAGING PERMITTED.—

(A) IN GENERAL.—For purposes of calculating the regional value-content of a motor vehicle described in paragraph (1) or (2), the producer may average its calculation over its fiscal year, using any of the categories described in subparagraph (B), on the basis of either all motor vehicles in the category or on the basis of only the motor vehicles in the category that are exported to the territory of one or more of the other NAFTA countries.

(B) CATEGORY DESCRIBED.—A category is described in this subparagraph if it is—

(i) the same model line of motor vehicles in the same class of vehicles produced in the same plant in the territory of a NAFTA country;

(ii) the same class of motor vehicles produced in the same plant in the territory of a NAFTA country;

(iii) the same model line of motor vehicles produced in the territory of a NAFTA country; or

(iv) if applicable, the basis set out in Annex 403.3 of the Agreement.

(4) ANNEX 403.1 AND ANNEX 403.2.—For purposes of calculating the regional value-content for any or all goods provided for in a tariff provision listed in Annex 403.1 of the Agreement, or a component or material identified in Annex 403.2 of the Agreement, produced in the same plant, the producer of the good may—

(A) average its calculation—

(i) over the fiscal year of the motor vehicle producer to whom the good is sold;

(ii) over any quarter or month; or

(iii) over its fiscal year, if the good is sold as an aftermarket part;

(B) calculate the average referred to in subparagraph (A) separately for any or all goods sold to one or more motor vehicle producers; or

(C) with respect to any calculation under this paragraph, make a separate calculation for goods that are exported to the territory of one or more NAFTA countries.

(5) PHASE-IN OF REGIONAL VALUE-CONTENT REQUIREMENT.—Notwithstanding Annex 401 of the Agreement, and except as provided in paragraph (6), the regional value-content requirement shall be—

(A) for a producer's fiscal year beginning on the day closest to January 1, 1998, and thereafter, 56 percent calculated under the net cost method, and for a producer's fiscal year beginning on the day closest to January 1, 2002, and thereafter, 62.5 percent calculated under the net cost method, for—

(i) a good that is a motor vehicle for the transport of 15 or fewer persons provided for in subheading 8702.10.00 or 8702.90.00, or a motor vehicle provided for in subheadings 8703.21 through 8703.90, or subheading 8704.21 or 8704.31; and

(ii) a good provided for in heading 8407 or 8408, or subheading 8708.40, that is for use in a motor vehicle identified in clause (i); and

(B) for a producer's fiscal year beginning on the day closest to January 1, 1998, and thereafter, 55 percent calculated under the net cost method, and for a producer's fiscal year beginning on the day closest to January 1, 2002, and thereafter, 60 percent calculated under the net cost method, for—

(i) a good that is a motor vehicle provided for in heading 8701, subheading 8704.10, 8704.22, 8704.23, 8704.32, or 8704.90, or heading 8705 or 8706, or a motor vehicle for the transport of 16 or more persons provided for in subheading 8702.10.00 or 8702.90.00;

(ii) a good provided for in heading 8407 or 8408, or subheading 8708.40 that is for use in a motor vehicle identified in clause (i); and

(iii) except for a good identified in subparagraph (A)(ii) or a good provided for in subheadings 8482.10 through 8482.80, or subheading 8483.20 or 8483.30, a good identified in Annex 403.1 of the Agreement that is subject to a regional value-content requirement and is for use in a motor vehicle identified in subparagraph (A)(i) or (B)(i).

(6) NEW AND REFITTED PLANTS.—The regional value-content requirement for a motor vehicle identified in paragraph (1) or (2) shall be—

(A) 50 percent for 5 years after the date on which the first motor vehicle prototype is produced in a plant by a motor vehicle assembler, if—

(i) it is a motor vehicle of a class, or marque, or, except for a motor vehicle identified in paragraph (2), size category and underbody, not previously produced by the motor vehicle assembler in the territory of any of the NAFTA countries;

(ii) the plant consists of a new building in which the motor vehicle is assembled; and

(iii) the plant contains substantially all new machinery that is used in the assembly of the motor vehicle; or

(B) 50 percent for 2 years after the date on which the first motor vehicle prototype is produced at a plant following a refit, if it is a motor vehicle of a class, or marque, or, except for a motor vehicle identified in paragraph (2), size category and underbody, different from that assembled by the motor vehicle assembler in the plant before the refit.

(7) ELECTION FOR CERTAIN VEHICLES FROM CANADA.—In the case of goods provided for in subheadings 8703.21 through 8703.90, or subheading 8704.21 or 8704.31, exported from Canada directly to the United States, and entered on or after January 1, 1989, and before the date of entry into force of the Agreement between the United States and Canada, an importer may elect to use the rules of origin set out in this section in lieu of the rules of origin contained in section 202 of the United States-Canada Free-Trade Agreement Implementation Act of 1988 (19 U.S.C. 2112 note) and may elect to use the method for calculating the value of nonoriginating materials established in article 403(2) of the Agreement in lieu of the method established in article 403(1) of the Agreement for purposes of determining eligibility for preferential duty treatment under the United States-Canada

Free-Trade Agreement. Any election under this paragraph shall be made in writing to the Customs Service not later than the date that is 180 days after the date of entry into force of the Agreement between the United States and Canada. Any such election may be made only if the liquidation of such entry has not become final. For purposes of averaging the calculation of regional value-content for the goods covered by such entry, where the producer's 1989–1990 fiscal year began after January 1, 1989, the producer may include the period between January 1, 1989, and the beginning of its first fiscal year after January 1, 1989, as part of fiscal year 1989–1990.

(d) ACCUMULATION.—

(1) DETERMINATION OF ORIGINATING GOOD.—For purposes of determining whether a good is an originating good, the production of the good in the territory of one or more of the NAFTA countries by one or more producers shall, at the choice of the exporter or producer of the good, be considered to have been performed in the territory of any of the NAFTA countries by that exporter or producer, if—

(A) all nonoriginating materials used in the production of the good undergo an applicable tariff classification change set out in Annex 401 of the Agreement;

(B) the good satisfies any applicable regional value-content requirement; and

(C) the good satisfies all other applicable requirements of this section.

The requirements of subparagraphs (A) and (B) must be satisfied entirely in the territory of one or more of the NAFTA countries.

(2) TREATMENT AS SINGLE PRODUCER.—For purposes of subsection (b)(10), the production of a producer that chooses to accumulate its production with that of other producers under paragraph (1) shall be treated as the production of a single producer.

(e) DE MINIMIS AMOUNTS OF NONORIGINATING MATERIALS.—

(1) IN GENERAL.—Except as provided in paragraphs (3), (4), (5), and (6), a good shall be considered to be an originating good if—

(A) the value of all nonoriginating materials used in the production of the good that do not undergo an applicable change in tariff classification (set out in Annex 401 of the Agreement) is not more than 7 percent of the transaction value of the good, adjusted to a F.O.B. basis, or

(B) where the transaction value of the good is unacceptable under Article 1 of the Customs Valuation Code, the value of all such nonoriginating materials is not more than 7 percent of the total cost of the good,

provided that the good satisfies all other applicable requirements of this section and, if the good is subject to a regional value-content requirement, the value of such nonoriginating materials is taken into account in calculating the regional value-content of the good.

(2) GOODS NOT SUBJECT TO REGIONAL VALUE-CONTENT REQUIREMENT.—A good that is otherwise subject to a regional value-content requirement shall not be required to satisfy such requirement if—

(A)(i) the value of all nonoriginating materials used in the production of the good is not more than 7 percent of the transaction value of the good, adjusted to a F.O.B. basis; or

(ii) where the transaction value of the good is unacceptable under Article 1 of the Customs Valuation Code, the value of all nonoriginating materials is not more than 7 percent of the total cost of the good; and

(B) the good satisfies all other applicable requirements of this section.

(3) DAIRY PRODUCTS, ETC.—Paragraph (1) does not apply to—

(A) a nonoriginating material provided for in chapter 4 of the HTS or a dairy preparation containing over 10 percent by weight of milk solids provided for in subheading 1901.90.30, 1901.90.40, or 1901.90.80 that is used in the production of a good provided for in chapter 4 of the HTS;

(B) a nonoriginating material provided for in chapter 4 of the HTS or a dairy preparation containing over 10 percent by weight of milk solids provided for in subheading 1901.90.30, 1901.90.40, or 1901.90.80 that is used in the production of—

(i) preparations for infants containing over 10 percent by weight of milk solids provided for in subheading 1901.10.00;

(ii) mixes and doughs, containing over 25 percent by weight of butterfat, not put up for retail sale, provided for in subheading 1901.20.00;

(iii) a dairy preparation containing over 10 percent by weight of milk solids provided for in subheading 1901.90.30, 1901.90.40, or 1901.90.80;

(iv) a good provided for in heading 2105 or subheading 2106.90.05, or preparations containing over 10 percent by weight of milk solids provided for in subheading 2106.90.15, 2106.90.40, 2106.90.50, or 2106.90.65;

(v) a good provided for in subheading 2202.90.10 or 2202.90.20; or

(vi) animal feeds containing over 10 percent by weight of milk solids provided for in subheading 2309.90.30;

(C) a nonoriginating material provided for in heading 0805 or subheadings 2009.11 through 2009.30 that is used in the production of—

(i) a good provided for in subheadings 2009.11 through 2009.30, or subheading 2106.90.16, or concentrated fruit or vegetable juice of any single fruit or vegetable, fortified with minerals or vitamins, provided for in subheading 2106.90.19; or

(ii) a good provided for in subheading 2202.90.30 or 2202.90.35, or fruit or vegetable juice of any single fruit or vegetable, fortified with minerals or vitamins, provided for in subheading 2202.90.36;

(D) a nonoriginating material provided for in chapter 9 of the HTS that is used in the production of instant coffee, not flavored, provided for in subheading 2101.10.20;

(E) a nonoriginating material provided for in chapter 15 of the HTS that is used in the production of a good provided for in headings 1501 through 1508, or heading 1512, 1514, or 1515;

(F) a nonoriginating material provided for in heading 1701 that is used in the production of a good provided for in headings 1701 through 1703;

(G) a nonoriginating material provided for in chapter 17 of the HTS or heading 1805 that is used in the production of a good provided for in subheading 1806.10;

(H) a nonoriginating material provided for in headings 2203 through 2208 that is used in the production of a good provided for in headings 2207 through 2208;

(I) a nonoriginating material used in the production of—

(i) a good provided for in subheading 7321.11.30;

(ii) a good provided for in subheading 8415.10, subheadings 8415.81 through 8415.83, subheadings 8418.10 through 8418.21, subheadings 8418.29 through 8418.40, subheading 8421.12 or 8422.11, subheadings 8450.11 through 8450.20, or subheadings 8451.21 through 8451.29;

(iii) trash compactors provided for in subheading 8479.89.60; or

(iv) a good provided for in subheading 8516.60.40; and

(J) a printed circuit assembly that is a nonoriginating material used in the production of a good where the applicable change in tariff classification for the good, as set out in Annex 401 of the Agreement, places restrictions on the use of such nonoriginating material.

(4) CERTAIN FRUIT JUICES.—Paragraph (1) does not apply to a nonoriginating single juice ingredient provided for in heading 2009 that is used in the production of—

(A) a good provided for in subheading 2009.90, or concentrated mixtures of fruit or vegetable juice, fortified with minerals or vitamins, provided for in subheading 2106.90.19; or

(B) mixtures of fruit or vegetable juices, fortified with minerals or vitamins, provided for in subheading 2202.90.39.

(5) GOODS PROVIDED FOR IN CHAPTERS 1 THROUGH 27 OF THE HTS.—Paragraph (1) does not apply to a nonoriginating material used in the production of a good provided for in chapters 1 through 27 of the HTS unless the nonoriginating material is provided for in a different subheading than the good for which origin is being determined under this section.

(6) GOODS PROVIDED FOR IN CHAPTERS 50 THROUGH 63 OF THE HTS.—A good provided for in chapters 50 through 63 of the HTS, that does not originate because certain fibers or yarns used in the production of the component of the good that determines the tariff classification of the good do not undergo an applicable change in tariff classification set out in Annex 401 of the Agreement, shall be considered to be a good that originates if the total weight of all such fibers or yarns in that component is not more than 7 percent of the total weight of that component.

(f) FUNGIBLE GOODS AND MATERIALS.—For purposes of determining whether a good is an originating good—

(1) if originating and nonoriginating fungible materials are used in the production of the good, the determination of whether the materials are originating need not be made through the identification of any specific fungible material, but may be determined on the basis of any of the inventory management methods set out in regulations implementing this section; and

(2) if originating and nonoriginating fungible goods are commingled and exported in the same form, the determination may be made on the basis of any of the inventory management methods set out in regulations implementing this section.

(g) ACCESSORIES, SPARE PARTS, OR TOOLS.—

(1) IN GENERAL.—Except as provided in paragraph (2), accessories, spare parts, or tools delivered with the good that form part of the good's standard accessories, spare parts, or tools shall—

(A) be considered as originating goods if the good is an originating good, and

(B) be disregarded in determining whether all the nonoriginating materials used in the production of the good undergo an applicable change in tariff classification set out in Annex 401 of the Agreement.

(2) CONDITIONS.—Paragraph (1) shall apply only if—

(A) the accessories, spare parts, or tools are not invoiced separately from the good;

(B) the quantities and value of the accessories, spare parts, or tools are customary for the good; and

(C) in any case in which the good is subject to a regional value-content requirement, the value of the accessories, spare parts, or tools are taken into account as originating or nonoriginating materials, as the case may be, in calculating the regional value-content of the good.

(h) INDIRECT MATERIALS.—An indirect material shall be considered to be an originating material without regard to where it is produced.

(i) PACKAGING MATERIALS AND CONTAINERS FOR RETAIL SALE.—Packaging materials and containers in which a good is packaged for retail sale, if classified with the good, shall be disregarded in determining whether all the nonoriginating materials used in the production of the good undergo an applicable change in tariff classification set out in Annex 401 of the Agreement. If the good is subject to a regional value-content requirement, the value of such packaging materials and containers shall be taken into account as originating or nonoriginating materials, as the case may be, in calculating the regional value-content of the good.

(j) PACKING MATERIALS AND CONTAINERS FOR SHIPMENT.—Packing materials and containers in which a good is packed for shipment shall be disregarded—

(1) in determining whether the nonoriginating materials used in the production of the good undergo an applicable change in tariff classification set out in Annex 401 of the Agreement; and

(2) in determining whether the good satisfies a regional value-content requirement.

(k) TRANSSHIPMENT.—A good shall not be considered to be an originating good by reason of having undergone production that satisfies the requirements of subsection (a) if, subsequent to that production, the good undergoes further production or any other operation outside the territories of the NAFTA countries, other than unloading, reloading, or any other operation necessary to preserve it in good condition or to transport the good to the territory of a NAFTA country.

(l) NONQUALIFYING OPERATIONS.—A good shall not be considered to be an originating good merely by reason of—

(1) mere dilution with water or another substance that does not materially alter the characteristics of the good; or

(2) any production or pricing practice with respect to which it may be demonstrated, by a preponderance of evidence, that the object was to circumvent this section.

(m) INTERPRETATION AND APPLICATION.—For purposes of this section:

(1) The basis for any tariff classification is the HTS.

(2) Except as otherwise expressly provided, whenever in this section there is a reference to a heading or subheading such reference shall be a reference to a heading or subheading of the HTS.

(3) In applying subsection (a)(4), the determination of whether a heading or subheading under the HTS provides for and specifically describes both a good and its parts shall be made on the basis of the nomenclature of the heading or subheading, the rules of interpretation, or notes of the HTS.

(4) In applying the Customs Valuation Code—

(A) the principles of the Customs Valuation Code shall apply to domestic transactions, with such modifications as may be required by the circumstances, as would apply to international transactions;

(B) the provisions of this section shall take precedence over the Customs Valuation Code to the extent of any difference; and

(C) the definitions in subsection (o) shall take precedence over the definitions in the Customs Valuation Code to the extent of any difference.

(5) All costs referred to in this section shall be recorded and maintained in accordance with the Generally Accepted Accounting Principles applicable in the territory of the NAFTA country in which the good is produced.

(n) ORIGIN OF AUTOMATIC DATA PROCESSING GOODS.—Notwithstanding any other provision of this section, when the NAFTA countries apply the most-favored-nation rate of duty described in paragraph 1 of section A of Annex 308.1 of the Agreement to a good provided for under the tariff provisions set out in Table 308.1.1 of such Annex, the good shall, upon importation from a NAFTA country, be deemed to originate in the territory of a NAFTA country for purposes of this section.

(o) SPECIAL RULE FOR CERTAIN AGRICULTURAL PRODUCTS.—Notwithstanding any other provision of this section, for purposes of applying a rate of duty to a good provided for in—

(1) heading 1202 that is exported from the territory of Mexico, if the good is not wholly obtained in the territory of Mexico,

(2) subheading 2008.11 that is exported from the territory of Mexico, if any material provided for in heading 1202 used

in the production of that good is not wholly obtained in the territory of Mexico, or

(3) subheading 1806.10.42 or 2106.90.12 that is exported from the territory of Mexico, if any material provided for in subheading 1701.99 used in the production of that good is not a qualifying good,

such good shall be treated as a nonoriginating good and, for purposes of this subsection, the terms "qualifying good" and "wholly obtained in the territory of" have the meaning given such terms in paragraph 26 of section A of Annex 703.2 of the Agreement.

(p) DEFINITIONS.—For purposes of this section—

(1) CLASS OF MOTOR VEHICLES.—The term "class of motor vehicles" means any one of the following categories of motor vehicles:

(A) Motor vehicles provided for in subheading 8701.20, subheading 8704.10, 8704.22, 8704.23, 8704.32, or 8704.90, or heading 8705 or 8706, or motor vehicles designed for the transport of 16 or more persons provided for in subheading 8702.10.00 or 8702.90.00.

(B) Motor vehicles provided for in subheading 8701.10, or subheadings 8701.30 through 8701.90.

(C) Motor vehicles for the transport of 15 or fewer persons provided for in subheading 8702.10.00 or 8702.90.00, or motor vehicles provided for in subheading 8704.21 or 8704.31.

(D) Motor vehicles provided for in subheadings 8703.21 through 8703.90.

(2) CUSTOMS VALUATION CODE.—The term "Customs Valuation Code" means the Agreement on Implementation of Article VII of the General Agreement on Tariffs and Trade, including its interpretative notes.

(3) F.O.B.—The term "F.O.B." means free on board, regardless of the mode of transportation, at the point of direct shipment by the seller to the buyer.

(4) FUNGIBLE GOODS AND FUNGIBLE MATERIALS.—The terms "fungible goods" and "fungible materials" mean goods or materials that are interchangeable for commercial purposes and whose properties are essentially identical.

(5) GENERALLY ACCEPTED ACCOUNTING PRINCIPLES.—The term "Generally Accepted Accounting Principles" means the recognized consensus or substantial authoritative support in the territory of a NAFTA country with respect to the recording of revenues, expenses, costs, assets and liabilities, disclosure of information, and preparation of financial statements. These standards may be broad guidelines of general application as well as detailed standards, practices, or procedures.

(6) GOODS WHOLLY OBTAINED OR PRODUCED ENTIRELY IN THE TERRITORY OF ONE OR MORE OF THE NAFTA COUNTRIES.—The term "goods wholly obtained or produced entirely in the territory of one or more of the NAFTA countries" means—

(A) mineral goods extracted in the territory of one or more of the NAFTA countries;

(B) vegetable goods harvested in the territory of one or more of the NAFTA countries;

(C) live animals born and raised in the territory of one or more of the NAFTA countries;

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(D) goods obtained from hunting, trapping, or fishing in the territory of one or more of the NAFTA countries;

(E) goods (such as fish, shellfish, and other marine life) taken from the sea by vessels registered or recorded with a NAFTA country and flying its flag;

(F) goods produced on board factory ships from the goods referred to in subparagraph (E), if such factory ships are registered or recorded with that NAFTA country and fly its flag;

(G) goods taken by a NAFTA country or a person of a NAFTA country from the seabed or beneath the seabed outside territorial waters, provided that a NAFTA country has rights to exploit such seabed;

(H) goods taken from outer space, if the goods are obtained by a NAFTA country or a person of a NAFTA country and not processed in a country other than a NAFTA country;

(I) waste and scrap derived from—

(i) production in the territory of one or more of the NAFTA countries; or

(ii) used goods collected in the territory of one or more of the NAFTA countries, if such goods are fit only for the recovery of raw materials; and

(J) goods produced in the territory of one or more of the NAFTA countries exclusively from goods referred to in subparagraphs (A) through (I), or from their derivatives, at any stage of production.

(7) IDENTICAL OR SIMILAR GOODS.—The term "identical or similar goods" means "identical goods" and "similar goods", respectively, as defined in the Customs Valuation Code.

(8) INDIRECT MATERIAL.—

(A) The term "indirect material" means a good—

(i) used in the production, testing, or inspection of a good but not physically incorporated into the good, or

(ii) used in the maintenance of buildings or the operation of equipment associated with the production of a good,

in the territory of one or more of the NAFTA countries.

(B) When used for a purpose described in subparagraph (A), the following materials are among those considered to be indirect materials:

(i) Fuel and energy.

(ii) Tools, dies, and molds.

(iii) Spare parts and materials used in the maintenance of equipment and buildings.

(iv) Lubricants, greases, compounding materials, and other materials used in production or used to operate equipment and buildings.

(v) Gloves, glasses, footwear, clothing, safety equipment, and supplies.

(vi) Equipment, devices, and supplies used for testing or inspecting the goods.

(vii) Catalysts and solvents.

(viii) Any other goods that are not incorporated into the good, if the use of such goods in the production of the good can reasonably be demonstrated to be a part of that production.

(9) INTERMEDIATE MATERIAL.—The term "intermediate material" means a material that is self-produced, used in the production of a good, and designated pursuant to subsection (b)(10).

(10) MARQUE.—The term "marque" means the trade name used by a separate marketing division of a motor vehicle assembler.

(11) MATERIAL.—The term "material" means a good that is used in the production of another good and includes a part or an ingredient.

(12) MODEL LINE.—The term "model line" means a group of motor vehicles having the same platform or model name.

(13) MOTOR VEHICLE ASSEMBLER.—The term "motor vehicle assembler" means a producer of motor vehicles and any related persons or joint ventures in which the producer participates.

(14) NAFTA COUNTRY.—The term "NAFTA country" means the United States, Canada or Mexico for such time as the Agreement is in force with respect to Canada or Mexico, and the United States applies the Agreement to Canada or Mexico.

(15) NEW BUILDING.—The term "new building" means a new construction, including at least the pouring or construction of new foundation and floor, the erection of a new structure and roof, and installation of new plumbing, electrical, and other utilities to house a complete vehicle assembly process.

(16) NET COST.—The term "net cost" means total cost less sales promotion, marketing and after-sales service costs, royalties, shipping and packing costs, and nonallowable interest costs that are included in the total cost.

(17) NET COST OF A GOOD.—The term "net cost of a good" means the net cost that can be reasonably allocated to a good using one of the methods set out in subsection (b)(8).

(18) NONALLOWABLE INTEREST COSTS.—The term "nonallowable interest costs" means interest costs incurred by a producer as a result of an interest rate that exceeds the applicable federal government interest rate for comparable maturities by more than 700 basis points, determined pursuant to regulations implementing this section.

(19) NONORIGINATING GOOD; NONORIGINATING MATERIAL.—The term "nonoriginating good" or "nonoriginating material" means a good or material that does not qualify as an originating good or material under the rules of origin set out in this section.

(20) ORIGINATING.—The term "originating" means qualifying under the rules of origin set out in this section.

(21) PRODUCER.—The term "producer" means a person who grows, mines, harvests, fishes, traps, hunts, manufactures, processes, or assembles a good.

(22) PRODUCTION.—The term "production" means growing, mining, harvesting, fishing, trapping, hunting, manufacturing, processing, or assembling a good.

(23) REASONABLY ALLOCATE.—The term "reasonably allocate" means to apportion in a manner appropriate to the circumstances.

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(24) REFIT.—The term "refit" means a plant closure, for purposes of plant conversion or retooling, that lasts at least 3 months.

(25) RELATED PERSONS.—The term "related persons" means persons specified in any of the following subparagraphs:

(A) Persons who are officers or directors of one another's businesses.

(B) Persons who are legally recognized partners in business.

(C) Persons who are employer and employee.

(D) Persons one of whom owns, controls, or holds 25 percent or more of the outstanding voting stock or shares of the other.

(E) Persons if 25 percent or more of the outstanding voting stock or shares of each of them is directly or indirectly owned, controlled, or held by a third person.

(F) Persons one of whom is directly or indirectly controlled by the other.

(G) Persons who are directly or indirectly controlled by a third person.

(H) Persons who are members of the same family.

For purposes of this paragraph, the term "members of the same family" means natural or adoptive children, brothers, sisters, parents, grandparents, or spouses.

(26) ROYALTIES.—The term "royalties" means payments of any kind, including payments under technical assistance or similar agreements, made as consideration for the use or right to use any copyright, literary, artistic, or scientific work, patent, trademark, design, model, plan, secret formula, or process. It does not include payments under technical assistance or similar agreements that can be related to specific services such as—

(A) personnel training, without regard to where performed; and

(B) if performed in the territory of one or more of the NAFTA countries, engineering, tooling, die-setting, software design and similar computer services, or other services.

(27) SALES PROMOTION, MARKETING, AND AFTER-SALES SERVICE COSTS.—The term "sales promotion, marketing, and after-sales service costs" means the costs related to sales promotion, marketing, and after-sales service for the following:

(A) Sales and marketing promotion, media advertising, advertising and market research, promotional and demonstration materials, exhibits, sales conferences, trade shows, conventions, banners, marketing displays, free samples, sales, marketing and after-sales service literature (product brochures, catalogs, technical literature, price lists, service manuals, sales aid information), establishment and protection of logos and trademarks, sponsorships, wholesale and retail restocking charges, and entertainment.

(B) Sales and marketing incentives, consumer, retailer, or wholesaler rebates, and merchandise incentives.

(C) Salaries and wages, sales commissions, bonuses, benefits (such as medical, insurance, and pension), traveling and living expenses, and membership and professional fees for sales promotion, marketing, and after-sales service personnel.

(D) Recruiting and training of sales promotion, marketing, and after-sales service personnel, and after-sales training of customers' employees, where such costs are identified separately for sales promotion, marketing, and after-sales service of goods on the financial statements or cost accounts of the producer.

(E) Product liability insurance.

(F) Office supplies for sales promotion, marketing, and after-sales service of goods, where such costs are identified separately for sales promotion, marketing, and after-sales service of goods on the financial statements or cost accounts of the producer.

(G) Telephone, mail, and other communications, where such costs are identified separately for sales promotion, marketing, and after-sales service of goods on the financial statements or cost accounts of the producer.

(H) Rent and depreciation of sales promotion, marketing, and after-sales service offices and distribution centers.

(I) Property insurance, taxes, utilities, and repair and maintenance of sales promotion, marketing, and after-sales service offices and distribution centers, where such costs are identified separately for sales promotion, marketing, and after-sales service of goods on the financial statements or cost accounts of the producer.

(J) Payments by the producer to other persons for warranty repairs.

(28) SELF-PRODUCED MATERIAL.—The term "self-produced material" means a material that is produced by the producer of a good and used in the production of that good.

(29) SHIPPING AND PACKING COSTS.—The term "shipping and packing costs" means the costs incurred in packing a good for shipment and shipping the good from the point of direct shipment to the buyer, but does not include the costs of preparing and packaging the good for retail sale.

(30) SIZE CATEGORY.—The term "size category" means with respect to a motor vehicle identified in subsection (c)(1)(A)—

(A) 85 cubic feet or less of passenger and luggage interior volume;

(B) more than 85 cubic feet, but less than 100 cubic feet, of passenger and luggage interior volume;

(C) at least 100 cubic feet, but not more than 110 cubic feet, of passenger and luggage interior volume;

(D) more than 110 cubic feet, but less than 120 cubic feet, of passenger and luggage interior volume; and

(E) 120 cubic feet or more of passenger and luggage interior volume.

(31) TERRITORY.—The term "territory" means a territory described in Annex 201.1 of the Agreement.

(32) TOTAL COST.—The term "total cost" means all product costs, period costs, and other costs incurred in the territory of one or more of the NAFTA countries.

(33) TRANSACTION VALUE.—Except as provided in subsection (c)(1) or (c)(2)(A), the term "transaction value" means the price actually paid or payable for a good or material with respect to a transaction of the producer of the good, adjusted in accordance with the principles of paragraphs 1, 3, and 4 of Article 8 of the Customs Valuation Code and determined

without regard to whether the good or material is sold for export.

(34) UNDERBODY.—The term "underbody" means the floor pan of a motor vehicle.

(35) USED.—The term "used" means used or consumed in the production of goods.

(q) PRESIDENTIAL PROCLAMATION AUTHORITY.—

(1) IN GENERAL.—The President is authorized to proclaim, as a part of the HTS—

(A) the provisions set out in Appendix 6.A of Annex 300–B, Annex 401, Annex 403.1, Annex 403.2, and Annex 403.3, of the Agreement, and

(B) any additional subordinate category necessary to carry out this title consistent with the Agreement.

(2) MODIFICATIONS.—Subject to the consultation and layover requirements of section 103, the President may proclaim—

(A) modifications to the provisions proclaimed under the authority of paragraph (1)(A), other than the provisions of paragraph A of Appendix 6 of Annex 300–B and section XI of part B of Annex 401 of the Agreement; and

(B) a modified version of the definition of any term set out in subsection (p) (and such modified version of the definition shall supersede the version in subsection (p)), but only if the modified version reflects solely those modifications to the same term in article 415 of the Agreement that are agreed to by the NAFTA countries before the 1st anniversary of the date of the enactment of this Act.

(3) SPECIAL RULES FOR TEXTILES.—Notwithstanding the provisions of paragraph (2)(A), and subject to the consultation and layover requirements of section 103, the President may proclaim—

(A) modifications to the provisions proclaimed under the authority of paragraph (1)(A) as are necessary to implement an agreement with one or more of the NAFTA countries pursuant to paragraph 2 of section 7 of Annex 300–B of the Agreement, and

(B) before the 1st anniversary of the date of the enactment of this Act, modifications to correct any typographical, clerical, or other nonsubstantive technical error regarding the provisions of Appendix 6.A of Annex 300–B and section XI of part B of Annex 401 of the Agreement.

SEC. 203. DRAWBACK.

(a) DEFINITION OF A GOOD SUBJECT TO NAFTA DRAWBACK.—For purposes of this Act and the amendments made by subsection (b), the term "good subject to NAFTA drawback" means any imported good other than the following:

(1) A good entered under bond for transportation and exportation to a NAFTA country.

(2) A good exported to a NAFTA country in the same condition as when imported into the United States. For purposes of this paragraph—

(A) processes such as testing, cleaning, repacking, or inspecting a good, or preserving it in its same condition, shall not be considered to change the condition of the good, and

(B) except for a good referred to in paragraph 12 of section A of Annex 703.2 of the Agreement that is exported to Mexico, if a good described in the first sentence of this paragraph is commingled with fungible goods and exported in the same condition, the origin of the good may be determined on the basis of the inventory methods provided for in the regulations implementing this title.

(3) A good—

(A) that is—

(i) deemed to be exported from the United States,

(ii) used as a material in the production of another good that is deemed to be exported to a NAFTA country, or

(iii) substituted for by a good of the same kind and quality that is used as a material in the production of another good that is deemed to be exported to a NAFTA country, and

(B) that is delivered—

(i) to a duty-free shop,

(ii) for ship's stores or supplies for ships or aircraft, or

(iii) for use in a project undertaken jointly by the United States and a NAFTA country and destined to become the property of the United States.

(4) A good exported to a NAFTA country for which a refund of customs duties is granted by reason of—

(A) the failure of the good to conform to sample or specification, or

(B) the shipment of the good without the consent of the consignee.

(5) A good that qualifies under the rules of origin set out in section 202 that is—

(A) exported to a NAFTA country,

(B) used as a material in the production of another good that is exported to a NAFTA country, or

(C) substituted for by a good of the same kind and quality that is used as a material in the production of another good that is exported to a NAFTA country.

(6) A good provided for in subheading 1701.11.02 of the HTS that is—

(A) used as a material, or

(B) substituted for by a good of the same kind and quality that is used as a material,

in the production of a good provided for in existing Canadian tariff item 1701.99.00 or existing Mexican tariff item 1701.99.01 or 1701.99.99 (relating to refined sugar).

(7) A citrus product that is exported to Canada.

(8) A good used as a material, or substituted for by a good of the same kind and quality that is used as a material, in the production of—

(A) apparel, or

(B) a good provided for in subheading 6307.90.99 (insofar as it relates to furniture moving pads), 5811.00.20, or 5811.00.30 of the HTS,

that is exported to Canada and that is subject to Canada's most-favored-nation rate of duty upon importation into Canada.

Where in paragraph (6) a good referred to by an item is described in parentheses following the item, the description is provided for purposes of reference only.

(b) CONSEQUENTIAL AMENDMENTS WITH DELAYED EFFECT.—

(1) BONDED MANUFACTURING WAREHOUSES.—The last paragraph of section 311 of the Tariff Act of 1930 (19 U.S.C. 1311) is amended to read as follows:

"No article manufactured in a bonded warehouse from materials that are goods subject to NAFTA drawback, as defined in section 203(a) of the North American Free Trade Agreement Implementation Act, may be withdrawn from warehouse for exportation to a NAFTA country, as defined in section 2(4) of that Act, without assessment of a duty on the materials in their condition and quantity, and at their weight, at the time of importation into the United States. The duty shall be paid before the 61st day after the date of exportation, except that upon the presentation, before such 61st day, of satisfactory evidence of the amount of any customs duties paid to the NAFTA country on the article, the customs duty may be waived or reduced (subject to section 508(b)(2)(B)) in an amount that does not exceed the lesser of—

"(1) the total amount of customs duties paid or owed on the materials on importation into the United States, or

"(2) the total amount of customs duties paid on the article to the NAFTA country.

If Canada ceases to be a NAFTA country and the suspension of the operation of the United States-Canada Free-Trade Agreement thereafter terminates, no article manufactured in a bonded warehouse, except to the extent that such article is made from an article that is a drawback eligible good under section 204(a) of the United States-Canada Free-Trade Agreement Implementation Act of 1988, may be withdrawn from such warehouse for exportation to Canada during the period such Agreement is in operation without payment of a duty on such imported merchandise in its condition, and at the rate of duty in effect, at the time of importation.".

(2) BONDED SMELTING AND REFINING WAREHOUSES.—Section 312 of the Tariff Act of 1930 (19 U.S.C. 1312) is amended—

(A) in paragraphs (1) and (4) of subsection (b), by striking out the parenthetical matter and the final ", or" and by adding at the end the following:

"; except that in the case of a withdrawal for exportation of such a product to a NAFTA country, as defined in section 2(4) of the North American Free Trade Agreement Implementation Act, if any of the imported metal-bearing materials are goods subject to NAFTA drawback, as defined in section 203(a) of that Act, the duties on the materials shall be paid, and the charges against the bond canceled, before the 61st day after the date of exportation; but upon the presentation, before such 61st day, of satisfactory evidence of the amount of any customs duties paid to the NAFTA country on the product, the duties on the materials may be waived or reduced (subject to section 508(b)(2)(B)) in an amount that does not exceed the lesser of—

"(A) the total amount of customs duties owed on the materials on importation into the United States, or

"(B) the total amount of customs duties paid to the NAFTA country on the product, or";

(B) by adding at the end of subsection (b) the following new flush sentence.

"If Canada ceases to be a NAFTA country and the suspension of the operation of the United States-Canada Free-Trade Agreement thereafter terminates, no charges against such bond may be canceled in whole or part upon an exportation to Canada under paragraph (1) or (4) during the period such Agreement is in operation except to the extent that the metal-bearing materials were of Canadian origin as determined in accordance with section 202 of the United States-Canada Free-Trade Agreement Implementation Act of 1988."; and

(C) in subsection (d) by striking out the parenthetical matter and by inserting before the period the following:

"; except that in the case of a withdrawal for exportation to a NAFTA country, as defined in section 2(4) of the North American Free Trade Agreement Implementation Act, if any of the imported metal-bearing materials are goods subject to NAFTA drawback, as defined in section 203(a) of that Act, charges against the bond shall be paid before the 61st day after the date of exportation; but upon the presentation, before such 61st day, of satisfactory evidence of the amount of any customs duties paid to the NAFTA country on the product, the bond shall be credited (subject to section 508(b)(2)(B)) in an amount not to exceed the lesser of—

"(1) the total amount of customs duties paid or owed on the materials on importation into the United States, or

"(2) the total amount of customs duties paid to the NAFTA country on the product.

If Canada ceases to be a NAFTA country and the suspension of the operation of the United States-Canada Free-Trade Agreement thereafter terminates, no bond shall be credited under this subsection with respect to an exportation of a product to Canada during the period such Agreement is in operation except to the extent that the product is a drawback eligible good under section 204(a) of the United States-Canada Free-Trade Agreement Implementation Act of 1988".

(3) DRAWBACK.—Subsections (n) and (o) of section 313 of the Tariff Act of 1930 (19 U.S.C. 1313 (n) and (o)) are amended to read as follows:

"(n)(1) For purposes of this subsection and subsection (o)—

"(A) the term 'NAFTA Act' means the North American Free Trade Agreement Implementation Act;

"(B) the terms 'NAFTA country' and 'good subject to NAFTA drawback' have the same respective meanings that are given such terms in sections 2(4) and 203(a) of the NAFTA Act; and

"(C) a refund, waiver, or reduction of duty under paragraph (2) of this subsection or paragraph (1) of subsection (o) is subject to section 508(b)(2)(B).

"(2) For purposes of subsections (a), (b), (f), (h), (p), and (q), if an article that is exported to a NAFTA country is a good subject to NAFTA drawback, no customs duties on the good may be refunded, waived, or reduced in an amount that exceeds the lesser of—

"(A) the total amount of customs duties paid or owed on the good on importation into the United States, or

"(B) the total amount of customs duties paid on the good to the NAFTA country.

"(3) If Canada ceases to be a NAFTA country and the suspension of the operation of the United States-Canada Free-Trade Agreement thereafter terminates, then for purposes of subsections (a), (b), (f), (h), (j)(2), and (q), the shipment to Canada during the period such Agreement is in operation of an article made from or substituted for, as appropriate, a drawback eligible good under section 204(a) of the United States-Canada Free-Trade Implementation Act of 1988 does not constitute an exportation.

"(o)(1) For purposes of subsection (g), if—

"(A) a vessel is built for the account and ownership of a resident of a NAFTA country or the government of a NAFTA country, and

"(B) imported materials that are used in the construction and equipment of the vessel are goods subject to NAFTA drawback,

the amount of customs duties refunded, waived, or reduced on such materials may not exceed the lesser of the total amount of customs duties paid or owed on the materials on importation into the United States or the total amount of customs duties paid on the vessel to the NAFTA country.

"(2) If Canada ceases to be a NAFTA country and the suspension of the operation of the United States-Canada Free-Trade Agreement thereafter terminates, then for purposes of subsection (g), vessels built for Canadian account and ownership, or for the Government of Canada, may not be considered to be built for any foreign account and ownership, or for the government of any foreign country, except to the extent that the materials in such vessels are drawback eligible goods under section 204(a) of the United States-Canada Free-Trade Implementation Act of 1988.".

(4) MANIPULATION IN WAREHOUSE.—Section 562 of the Tariff Act of 1930 (19 U.S.C. 1562) is amended—

(A) in the second sentence by striking out "without payment of duties—" and inserting a dash;

(B) by striking out paragraphs (1), (2), and (3) and inserting the following:

"(1) without payment of duties for exportation to a NAFTA country, as defined in section 2(4) of the North American Free Trade Agreement Implementation Act, if the merchandise is of a kind described in any of paragraphs (1) through (8) of section 203(a) of that Act;

"(2) for exportation to a NAFTA country if the merchandise consists of goods subject to NAFTA drawback, as defined in section 203(a) of that Act, except that—

"(A) the merchandise may not be withdrawn from warehouse without assessment of a duty on the merchandise in its condition and quantity, and at its weight, at the time of withdrawal from the warehouse with such additions to or deductions from the final appraised value as may be necessary by reason of change in condition, and

"(B) duty shall be paid on the merchandise before the 61st day after the date of exportation, but upon the presentation, before such 61st day, of satisfactory evidence of the amount of any customs duties paid to the NAFTA country on the merchandise, the customs duty may be waived or reduced (subject to section 508(b)(2)(B)) in an amount that does not exceed the lesser of—

"(i) the total amount of customs duties paid or owed on the merchandise on importation into the United States, or

"(ii) the total amount of customs duties paid on the merchandise to the NAFTA country;

"(3) without payment of duties for exportation to any foreign country other than to a NAFTA country or to Canada when exports to that country are subject to paragraph (4);

"(4) without payment of duties for exportation to Canada (if that country ceases to be a NAFTA country and the suspension of the operation of the United States-Canada Free-Trade Agreement thereafter terminates), but the exemption from the payment of duties under this paragraph applies only in the case of an exportation during the period such Agreement is in operation of merchandise that—

"(A) is only cleaned, sorted, or repacked in a bonded warehouse, or

"(B) is a drawback eligible good under section 204(a) of the United States-Canada Free-Trade Agreement Implementation Act of 1988; and

"(5) without payment of duties for shipment to the Virgin Islands, American Samoa, Wake Island, Midway Island, Kingman Reef, Johnston Island or the island of Guam."; and

(B) in the third sentence by striking out "paragraph (1) of the preceding sentence" and inserting "paragraph (4) of the preceding sentence".

(5) FOREIGN TRADE ZONES.—Section 3(a) of the Act of June 18, 1934 (commonly known as the "Foreign Trade Zones Act"; 19 U.S.C. 81c(a)) is amended—

(A) in the last proviso—

(i) by inserting after "That" the following: ", if Canada ceases to be a NAFTA country and the suspension of the operation of the United States-Canada Free-Trade Agreement thereafter terminates,"; and

(ii) by striking out "on or after January 1, 1994, or such later date as may be proclaimed by the President under section 204(b)(2)(B) of such Act of 1988," and inserting "during the period such Agreement is in operation"; and

(B) by inserting before such last proviso the following new proviso: "*: Provided, further,* That no merchandise that consists of goods subject to NAFTA drawback, as defined in section 203(a) of the North American Free Trade Agreement Implementation Act, that is manufactured or otherwise changed in condition shall be exported to a NAFTA country, as defined in section 2(4) of that Act, without an assessment of a duty on the merchandise in its condition and quantity, and at its weight, at the time of its exportation (or if the privilege in the first proviso to this subsection was requested, an assessment of a duty on the merchandise in its condition and quantity, and at its weight, at the time of its admission into the zone) and the payment of the assessed duty before the 61st day after the date of exportation of the article, except that upon the presentation, before such 61st day, of satisfactory evidence of the amount of any customs duties paid or owed to the NAFTA country on the article, the customs duty may be waived or reduced (subject to section 508(b)(2)(B) of the Tariff Act of 1930) in an amount that does not exceed the lesser of (1) the total amount of customs duties paid or owed on the merchandise on importation into the United States, or (2) the total amount of customs duties paid on the article to the NAFTA country:".

(c) CONSEQUENTIAL AMENDMENT WITH IMMEDIATE EFFECT.—Section 313(j) of the Tariff Act of 1930 (19 U.S.C. 1313(j)) is amended—

(1) by striking out "If" in paragraph (2) and inserting "Subject to paragraph (4), if"; and

(2) by adding at the end the following new paragraph:

"(4) Effective upon the entry into force of the North American Free Trade Agreement, the exportation to a NAFTA country, as defined in section 2(4) of the North American Free Trade Agreement Implementation Act, of merchandise that is fungible with and substituted for imported merchandise, other than merchandise described in paragraphs (1) through (8) of section 203(a) of that Act, shall not constitute an exportation for purposes of paragraph (2).".

(d) ELIMINATION OF DRAWBACK FOR SECTION 22 FEES.—Notwithstanding any other provision of law, the Secretary of the Treasury may not, on condition of export, refund or reduce a fee applied pursuant to section 22 of the Agricultural Adjustment Act (7 U.S.C. 624) with respect to goods included under subsection (a) that are exported to—

(1) Canada after December 31, 1995, for so long as it is a NAFTA country; or

(2) Mexico after December 31, 2000, for so long as it is a NAFTA country.

(e) INAPPLICABILITY TO COUNTERVAILING AND ANTIDUMPING DUTIES.—Nothing in this section or the amendments made by it shall be considered to authorize the refund, waiver, or reduction of countervailing duties or antidumping duties imposed on an imported good.

SEC. 204. CUSTOMS USER FEES.

Paragraph (10) of section 13031(b) of the Consolidated Omnibus Budget Reconciliation Act of 1985 (19 U.S.C. 58c(b)(10)) is amended to read as follows:

"(10)(A) The fee charged under subsection (a) (9) or (10) with respect to goods of Canadian origin (as determined under section 202 of the United States-Canada Free-Trade Agreement) when the United States-Canada Free-Trade Agreement is in force shall be in accordance with section 403 of that Agreement.

"(B) For goods qualifying under the rules of origin set out in section 202 of the North American Free Trade Agreement Implementation Act, the fee under subsection (a) (9) or (10)—

"(i) may not be charged with respect to goods that qualify to be marked as goods of Canada pursuant to Annex 311 of the North American Free Trade Agreement, for such time as Canada is a NAFTA country, as defined in section 2(4) of such Implementation Act; and

"(ii) may not be increased after December 31, 1993, and may not be charged after June 29, 1999, with respect to goods that qualify to be marked as goods of Mexico pursuant to such Annex 311, for such time as Mexico is a NAFTA country.

Any service for which an exemption from such fee is provided by reason of this paragraph may not be funded with money contained in the Customs User Fee Account.".

SEC. 205. ENFORCEMENT.

(a) RECORDKEEPING REQUIREMENTS.—Section 508 of the Tariff Act of 1930 (19 U.S.C. 1508) is amended as follows:

(1) Subsection (b) is amended to read as follows:

"(b) EXPORTATIONS TO FREE TRADE COUNTRIES.—

"(1) DEFINITIONS.—As used in this subsection—

"(A) The term 'associated records' means, in regard to an exported good under paragraph (2), records associated with—

"(i) the purchase of, cost of, value of, and payment for, the good;

"(ii) the purchase of, cost of, value of, and payment for, all material, including indirect materials, used in the production of the good; and

"(iii) the production of the good.

For purposes of this subparagraph, the terms 'indirect material', 'material', 'preferential tariff treatment', 'used', and 'value' have the respective meanings given them in articles 415 and 514 of the North American Free Trade Agreement.

"(B) The term 'NAFTA Certificate of Origin' means the certification, established under article 501 of the North American Free Trade Agreement, that a good qualifies as an originating good under such Agreement.

"(2) EXPORTS TO NAFTA COUNTRIES.—

"(A) IN GENERAL.—Any person who completes and signs a NAFTA Certificate of Origin for a good for which preferential treatment under the North American Free Trade Agreement is claimed shall make, keep, and render for examination and inspection all records relating to the origin of the good (including the Certificate or copies thereof) and the associated records.

"(B) CLAIMS FOR CERTAIN WAIVERS, REDUCTIONS, OR REFUNDS OF DUTIES OR FOR CREDIT AGAINST BONDS.—

"(i) IN GENERAL.—Any person that claims with respect to an article—

"(I) a waiver or reduction of duty under the last paragraph of section 311, section 312(b) (1) or (4), section 562(2), or the last proviso to section 3(a) of the Foreign Trade Zones Act;

"(II) a credit against a bond under section 312(d); or

"(III) a refund, waiver, or reduction of duty under section 313 (n)(2) or (o)(1);

must disclose to the Customs Service the information described in clause (ii).

"(ii) INFORMATION REQUIRED.—Within 30 days after making a claim described in clause (i) with respect to an article, the person making the claim must disclose to the Customs Service whether that person has prepared, or has knowledge that another person has prepared, a NAFTA Certificate of Origin for the article. If after such 30-day period the person making the claim either—

"(I) prepares a NAFTA Certificate of Origin for the article; or

"(II) learns of the existence of such a Certificate for the article;

that person, within 30 days after the occurrence described in subclause (I) or (II), must disclose the occurrence to the Customs Service.

"(iii) ACTION ON CLAIM.—If the Customs Service determines that a NAFTA Certificate of Origin has been prepared with respect to an article for which a claim described in clause (i) is made, the Customs Service may make such adjustments regarding the previous customs treatment of the article as may be warranted.

"(3) EXPORTS UNDER THE CANADIAN AGREEMENT.—Any person who exports, or who knowingly causes to be exported, any merchandise to Canada during such time as the United States-Canada Free-Trade Agreement is in force with respect to, and the United States applies that Agreement to, Canada shall make, keep, and render for examination and inspection such records (including certifications of origin or copies thereof) which pertain to the exportations.".

(2) Subsection (c) is amended to read as follows:

"(c) PERIOD OF TIME.—The records required by subsections (a) and (b) shall be kept for such periods of time as the Secretary shall prescribe; except that—

"(1) no period of time for the retention of the records required under subsection (a) or (b)(3) may exceed 5 years from the date of entry or exportation, as appropriate;

"(2) the period of time for the retention of the records required under subsection (b)(2) shall be at least 5 years from the date of signature of the NAFTA Certificate of Origin; and

"(3) records for any drawback claim shall be kept until the 3rd anniversary of the date of payment of the claim.".

(3) Subsection (e) is amended to read as follows:

"(e) SUBSECTION (b) PENALTIES.—

"(1) RELATING TO NAFTA EXPORTS.—Any person who fails to retain records required by paragraph (2) of subsection (b) or the regulations issued to implement that paragraph shall be liable for—

"(A) a civil penalty not to exceed $10,000; or

"(B) the general recordkeeping penalty that applies under the customs laws;

whichever penalty is higher.

"(2) RELATING TO CANADIAN AGREEMENT EXPORTS.—Any person who fails to retain the records required by paragraph (3) of subsection (b) or the regulations issued to implement that paragraph shall be liable for a civil penalty not to exceed $10,000.".

(b) CONFORMING AMENDMENT.—Section 509(a)(2)(A)(ii) of the Tariff Act of 1930 (19 U.S.C. 1509(a)(2)(A)(ii)) is amended to read as follows:

"(ii) exported merchandise, or knowingly caused merchandise to be exported, to a NAFTA country (as defined in section 2(4) of the North American Free

Trade Agreement Implementation Act) or to Canada during such time as the United States-Canada Free-Trade Agreement is in force with respect to, and the United States applies that Agreement to, Canada,".

(c) DISCLOSURE OF INCORRECT INFORMATION.—Section 592 of the Tariff Act of 1930 (19 U.S.C. 1592) is amended—

(1) in subsection (c)—

(A) by redesignating paragraph (5) as paragraph (6); and

(B) by inserting after paragraph (4) the following new paragraph:

"(5) PRIOR DISCLOSURE REGARDING NAFTA CLAIMS.—An importer shall not be subject to penalties under subsection (a) for making an incorrect claim for preferential tariff treatment under section 202 of the North American Free Trade Agreement Implementation Act if the importer—

"(A) has reason to believe that the NAFTA Certificate of Origin (as defined in section 508(b)(1)) on which the claim was based contains incorrect information; and

"(B) in accordance with regulations issued by the Secretary, voluntarily and promptly makes a corrected declaration and pays any duties owing."; and

(2) by adding at the end the following new subsection:

"(f) FALSE CERTIFICATIONS REGARDING EXPORTS TO NAFTA COUNTRIES.—

"(1) IN GENERAL.—Subject to paragraph (3), it is unlawful for any person to certify falsely, by fraud, gross negligence, or negligence, in a NAFTA Certificate of Origin (as defined in section 508(b)(1)) that a good to be exported to a NAFTA country (as defined in section 2(4) of the North American Free Trade Agreement Implementation Act) qualifies under the rules of origin set out in section 202 of that Act.

"(2) APPLICABLE PROVISIONS.—The procedures and penalties of this section that apply to a violation of subsection (a) also apply to a violation of paragraph (1), except that—

"(A) subsection (d) does not apply, and

"(B) subsection (c)(5) applies only if the person voluntarily and promptly provides, to all persons to whom the person provided the NAFTA Certificate of Origin, written notice of the falsity of the Certificate.

"(3) EXCEPTION.—A person may not be considered to have violated paragraph (1) if—

"(A) the information was correct at the time it was provided in a NAFTA Certificate of Origin but was later rendered incorrect due to a change in circumstances; and

"(B) the person voluntarily and promptly provides written notice of the change to all persons to whom the person provided the Certificate of Origin.".

SEC. 206. RELIQUIDATION OF ENTRIES FOR NAFTA-ORIGIN GOODS.

Section 520 of the Tariff Act of 1930 (19 U.S.C. 1520) is amended by adding at the end the following new subsection:

"(d) Notwithstanding the fact that a valid protest was not filed, the Customs Service may, in accordance with regulations prescribed by the Secretary, reliquidate an entry to refund any excess duties paid on a good qualifying under the rules of origin set out in section 202 of the North American Free Trade Agreement

Implementation Act for which no claim for preferential tariff treatment was made at the time of importation if the importer, within 1 year after the date of importation, files, in accordance with those regulations, a claim that includes—

"(1) a written declaration that the good qualified under those rules at the time of importation;

"(2) copies of all applicable NAFTA Certificates of Origin (as defined in section 508(b)(1)); and

"(3) such other documentation relating to the importation of the goods as the Customs Service may require.".

SEC. 207. COUNTRY OF ORIGIN MARKING OF NAFTA GOODS.

(a) AMENDMENTS TO TARIFF ACT OF 1930.—Section 304 of the Tariff Act of 1930 (19 U.S.C. 1304) is amended—

(1) in subsection (c)(1), by striking "or engraving" and inserting "engraving, or continuous paint stenciling";

(2) in subsection (c)(2)—

(A) by striking "four" and inserting "five"; and

(B) by striking "such as paint stenciling";

(3) in subsection (e), by striking "or engraving" and inserting "engraving, or an equally permanent method of marking";

(4) by redesignating subsection (h) as subsection (i); and

(5) by inserting after subsection (g) the following new subsection:

"(h) TREATMENT OF GOODS OF A NAFTA COUNTRY.—

"(1) APPLICATION OF SECTION.—In applying this section to an article that qualifies as a good of a NAFTA country (as defined in section 2(4) of the North American Free Trade Agreement Implementation Act) under the regulations issued by the Secretary to implement Annex 311 of the North American Free Trade Agreement—

"(A) the exemption under subsection (a)(3)(H) shall be applied by substituting 'reasonably know' for 'necessarily know';

"(B) the Secretary shall exempt the good from the requirements for marking under subsection (a) if the good—

"(i) is an original work of art, or

"(ii) is provided for under subheading 6904.10, heading 8541, or heading 8542 of the Harmonized Tariff Schedule of the United States; and

"(C) subsection (b) does not apply to the usual container of any good described in subsection (a)(3) (E) or (I) or subparagraph (B) (i) or (ii) of this paragraph.

"(2) PETITION RIGHTS OF NAFTA EXPORTERS AND PRODUCERS REGARDING MARKING DETERMINATIONS.—

"(A) DEFINITIONS.—For purposes of this paragraph:

"(i) The term 'adverse marking decision' means a determination by the Customs Service which an exporter or producer of merchandise believes to be contrary to Annex 311 of the North American Free Trade Agreement.

"(ii) A person may not be treated as the exporter or producer of merchandise regarding which an adverse marking decision was made unless such person—

"(I) if claiming to be the exporter, is located in a NAFTA country and is required to maintain records in that country regarding exportations to NAFTA countries; or

"(II) if claiming to be the producer, grows, mines, harvests, fishes, traps, hunts, manufactures, processes, or assembles such merchandise in a NAFTA country.

"(B) INTERVENTION OR PETITION REGARDING ADVERSE MARKING DECISIONS.—If the Customs Service makes an adverse marking decision regarding any merchandise, the Customs Service shall, upon written request by the exporter or producer of the merchandise, provide to the exporter or producer a statement of the basis for the decision. If the exporter or producer believes that the decision is not correct, it may intervene in any protest proceeding initiated by the importer of the merchandise. If the importer does not file a protest with regard to the decision, the exporter or producer may file a petition with the Customs Service setting forth—

"(i) a description of the merchandise; and

"(ii) the basis for its claim that the merchandise should be marked as a good of a NAFTA country.

"(C) EFFECT OF DETERMINATION REGARDING DECISION.—If, after receipt and consideration of a petition filed by an exporter or producer under subparagraph (B), the Customs Service determines that the adverse marking decision—

"(i) is not correct, the Customs Service shall notify the petitioner of the determination and all merchandise entered, or withdrawn from warehouse for consumption, more than 30 days after the date that notice of the determination under this clause is published in the weekly Custom Bulletin shall be marked in conformity with the determination; or

"(ii) is correct, the Customs Service shall notify the petitioner that the petition is denied.

"(D) JUDICIAL REVIEW.—For purposes of judicial review, the denial of a petition under subparagraph (C)(ii) shall be treated as if it were a denial of a petition of an interested party under section 516 regarding an issue arising under any of the preceding provisions of this section.".

(b) COORDINATION WITH 1988 ACT REGARDING CERTAIN ARTICLES.—Articles that qualify as goods of a NAFTA country under regulations issued by the Secretary in accordance with Annex 311 of the Agreement are exempt from the marking requirements promulgated by the Secretary of the Treasury under section 1907(c) of the Omnibus Trade and Competitiveness Act of 1988 (Public Law 100–418), but are subject to the requirements of section 304 of the Tariff Act of 1930 (19 U.S.C. 1304).

SEC. 208. PROTESTS AGAINST ADVERSE ORIGIN DETERMINATIONS.

Section 514 of the Tariff Act of 1930 (19 U.S.C. 1514) is amended—

(1) in subsection (c)(1) by inserting ", or with respect to a determination of origin under section 202 of the North American Free Trade Agreement Implementation Act," after "with respect to any one category of merchandise" in the fourth sentence;

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(2) in subsection (c)(2)—

(A) by striking out "or" at the end of subparagraph (D);

(B) by redesignating subparagraph (E) as subparagraph (F);

(C) by inserting after subparagraph (D) the following new subparagraph:

"(E) with respect to a determination of origin under section 202 of the North American Free Trade Agreement Implementation Act, any exporter or producer of the merchandise subject to that determination, if the exporter or producer completed and signed a NAFTA Certificate of Origin covering the merchandise; or"; and

(D) by striking "clauses (A) through (D)" in subparagraph (F) (as redesignated by subparagraph (B)), and inserting "clauses (A) through (E)"; and

(3) by adding at the end the following new subsections:

"(e) ADVANCE NOTICE OF CERTAIN DETERMINATIONS.—Except as provided in subsection (f), an exporter or producer referred to in subsection (c)(2)(E) shall be provided notice in advance of an adverse determination of origin under section 202 of the North American Free Trade Agreement Implementation Act. The Secretary may, by regulations, prescribe the time period in which such advance notice shall be issued and authorize the Customs Service to provide in the notice the entry number and any other entry information considered necessary to allow the exporter or producer to exercise the rights provided by this section.

"(f) DENIAL OF PREFERENTIAL TREATMENT.—If the Customs Service finds indications of a pattern of conduct by an exporter or producer of false or unsupported representations that goods qualify under the rules of origin set out in section 202 of the North American Free Trade Agreement Implementation Act—

"(1) the Customs Service, in accordance with regulations issued by the Secretary, may deny preferential tariff treatment to entries of identical goods exported or produced by that person; and

"(2) the advance notice requirement in subsection (e) shall not apply to that person;

until the person establishes to the satisfaction of the Customs Service that its representations are in conformity with section 202.".

SEC. 209. EXCHANGE OF INFORMATION.

Section 628 of the Tariff Act of 1930 (19 U.S.C. 1628) is amended by adding at the end the following new subsection:

"(c) The Secretary may authorize the Customs Service to exchange information with any government agency of a NAFTA country, as defined in section 2(4) of the North American Free Trade Agreement Implementation Act, if the Secretary—

"(1) reasonably believes the exchange of information is necessary to implement chapter 3, 4, or 5 of the North American Free Trade Agreement, and

"(2) obtains assurances from such country that the information will be held in confidence and used only for governmental purposes.".

SEC. 210. PROHIBITION ON DRAWBACK FOR TELEVISION PICTURE TUBES.

Notwithstanding any other provision of law, no customs duties may be refunded, waived, or reduced on color cathode-ray television picture tubes, including video monitor cathode-ray tubes (provided for in subheading 8540.11.00 of the HTS), that are nonoriginating goods under section 202(p)(19) and are—

(A) exported to a NAFTA country;

(B) used as a material in the production of other goods that are exported to a NAFTA country; or

(C) substituted for by goods of the same kind and quality used as a material in the production of other goods that are exported to a NAFTA country.

SEC. 211. MONITORING OF TELEVISION AND PICTURE TUBE IMPORTS.

(a) MONITORING.—Beginning on the date the Agreement enters into force with respect to the United States, the United States Customs Service shall, for a period of 5 years, monitor imports into the United States of articles described in subheading 8528.10 of the HTS from NAFTA countries and shall take action to exercise all rights of the United States under chapter 5 of the Agreement with respect to such imports. The United States Customs Service shall take appropriate action under chapter 5 of the Agreement with respect to such imports, including verifications to ensure that the rules of origin under the Agreement are fully complied with and that the duty drawback obligations contained in article 303 and Annex 303.8 of the Agreement are fully implemented and duties are correctly assessed.

(b) REPORT TO TRADE REPRESENTATIVE.—The United States Customs Service shall make the results of the monitoring and verification required by subsection (a) available to the President and the Trade Representative. If, based on such information, the President has reason to believe that articles described in subheading 8540.11 of the HTS, intended for ultimate consumption in the United States, are entering the territory of a NAFTA country inconsistent with the provisions of the Agreement, or have been undervalued in a manner that may raise concerns under United States trade laws, the President shall promptly take such action as may be appropriate under all relevant provisions of the Agreement, including article 317 and chapter 20, and under applicable United States trade statutes.

SEC. 212. TITLE VI AMENDMENTS.

Any amendment in this title to a law that is also amended under title VI shall be made after the title VI amendment is executed.

SEC. 213. EFFECTIVE DATES.

(a) PROVISIONS EFFECTIVE ON DATE OF ENACTMENT.—Section 212 and this section take effect on the date of the enactment of this Act.

(b) PROVISIONS EFFECTIVE WHEN AGREEMENT ENTERS INTO FORCE.—Section 201, section 202, section 203 (a), (d), and (e), section 210 and section 211, the amendment made by section 203(c), and the amendments made by sections 204 through 209 take effect on the date the Agreement enters into force with respect to the United States.

(c) PROVISIONS WITH DELAYED EFFECTIVE DATES.—The amendments made by section 203(b) apply—

(1) with respect to exports from the United States to Canada—

(A) on January 1, 1996, if Canada is a NAFTA country on that date, and

(B) after such date for so long as Canada continues to be a NAFTA country; and

(2) with respect to exports from the United States to Mexico—

(A) on January 1, 2001, if Mexico is a NAFTA country on that date; and

(B) after such date for so long as Mexico continues to be a NAFTA country.

TITLE III—APPLICATION OF AGREEMENT TO SECTORS AND SERVICES

Subtitle A—Safeguards

PART 1—RELIEF FROM IMPORTS BENEFITING FROM THE AGREEMENT

SEC. 301. DEFINITIONS.

As used in this part:

(1) CANADIAN ARTICLE.—The term "Canadian article" means an article that—

(A) is an originating good under chapter 4 of the Agreement; and

(B) qualifies under the Agreement to be marked as a good of Canada.

(2) MEXICAN ARTICLE.—The term "Mexican article" means an article that—

(A) is an originating good under chapter 4 of the Agreement; and

(B) qualifies under the Agreement to be marked as a good of Mexico.

SEC. 302. COMMENCING OF ACTION FOR RELIEF.

(a) FILING OF PETITION.—

(1) IN GENERAL.—A petition requesting action under this part for the purpose of adjusting to the obligations of the United States under the Agreement may be filed with the International Trade Commission by an entity, including a trade association, firm, certified or recognized union, or group of workers, that is representative of an industry. The International Trade Commission shall transmit a copy of any petition filed under this subsection to the Trade Representative.

(2) PROVISIONAL RELIEF.—An entity filing a petition under this subsection may request that provisional relief be provided as if the petition had been filed under section 202(a) of the Trade Act of 1974.

(3) CRITICAL CIRCUMSTANCES.—An allegation that critical circumstances exist must be included in the petition or made

on or before the 90th day after the date on which the investigation is initiated under subsection (b).

(b) INVESTIGATION AND DETERMINATION.—Upon the filing of a petition under subsection (a), the International Trade Commission, unless subsection (d) applies, shall promptly initiate an investigation to determine whether, as a result of the reduction or elimination of a duty provided for under the Agreement, a Canadian article or a Mexican article, as the case may be, is being imported into the United States in such increased quantities (in absolute terms) and under such conditions so that imports of the article, alone, constitute a substantial cause of—

(1) serious injury; or

(2) except in the case of a Canadian article, a threat of serious injury;

to the domestic industry producing an article that is like, or directly competitive with, the imported article.

(c) APPLICABLE PROVISIONS.—The provisions of—

(1) paragraphs (1)(B), (3) (except subparagraph (A)), and (4) of subsection (b);

(2) subsection (c); and

(3) subsection (d),

of section 202 of the Trade Act of 1974 (19 U.S.C. 2252) apply with respect to any investigation initiated under subsection (b).

(d) ARTICLES EXEMPT FROM INVESTIGATION.—No investigation may be initiated under this section with respect to—

(1) any Canadian article or Mexican article if import relief has been provided under this part with respect to that article; or

(2) any textile or apparel article set out in Appendix 1.1 of Annex 300–B of the Agreement.

SEC. 303. INTERNATIONAL TRADE COMMISSION ACTION ON PETITION.

(a) DETERMINATION.—By no later than 120 days after the date on which an investigation is initiated under section 302(b) with respect to a petition, the International Trade Commission shall—

(1) make the determination required under that section; and

(2) if the determination referred to in paragraph (1) is affirmative and an allegation regarding critical circumstances was made under section 302(a), make a determination regarding that allegation.

(b) ADDITIONAL FINDING AND RECOMMENDATION IF DETERMINATION AFFIRMATIVE.—If the determination made by the International Trade Commission under subsection (a) with respect to imports of an article is affirmative, the International Trade Commission shall find, and recommend to the President in the report required under subsection (c), the amount of import relief that is necessary to remedy or, except in the case of imports of a Canadian article, prevent the injury found by the International Trade Commission in the determination. The import relief recommended by the International Trade Commission under this subsection shall be limited to that described in section 304(c).

(c) REPORT TO PRESIDENT.—No later than the date that is 30 days after the date on which a determination is made under subsection (a) with respect to an investigation, the International Trade Commission shall submit to the President a report that shall include—

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(1) a statement of the basis for the determination;

(2) dissenting and separate views; and

(3) any finding made under subsection (b) regarding import relief.

(d) PUBLIC NOTICE.—Upon submitting a report to the President under subsection (c), the International Trade Commission shall promptly make public such report (with the exception of information which the International Trade Commission determines to be confidential) and shall cause a summary thereof to be published in the Federal Register.

(e) APPLICABLE PROVISIONS.—For purposes of this part, the provisions of paragraphs (1), (2), and (3) of section 330(d) of the Tariff Act of 1930 (19 U.S.C. 1330(d)) shall be applied with respect to determinations and findings made under this section as if such determinations and findings were made under section 202 of the Trade Act of 1974 (19 U.S.C. 2252).

SEC. 304. PROVISION OF RELIEF.

(a) IN GENERAL.—No later than the date that is 30 days after the date on which the President receives the report of the International Trade Commission containing an affirmative determination of the International Trade Commission under section 303(a), the President, subject to subsection (b), shall provide relief from imports of the article that is the subject of such determination to the extent that the President determines necessary to remedy or, except in the case of imports of a Canadian article, prevent the injury found by the International Trade Commission.

(b) EXCEPTION.—The President is not required to provide import relief under this section if the President determines that the provision of the import relief will not provide greater economic and social benefits than costs.

(c) NATURE OF RELIEF.—The import relief (including provisional relief) that the President is authorized to provide under this part is as follows:

(1) In the case of imports of a Canadian article—

(A) the suspension of any further reduction provided for under Annex 401.2 of the United States-Canada Free-Trade Agreement in the duty imposed on such article;

(B) an increase in the rate of duty imposed on such article to a level that does not exceed the lesser of—

(i) the column 1 general rate of duty imposed under the HTS on like articles at the time the import relief is provided, or

(ii) the column 1 general rate of duty imposed on like articles on December 31, 1988; or

(C) in the case of a duty applied on a seasonal basis to such article, an increase in the rate of duty imposed on the article to a level that does not exceed the column 1 general rate of duty imposed on the article for the corresponding season occurring immediately before January 1, 1989.

(2) In the case of imports of a Mexican article—

(A) the suspension of any further reduction provided for under the United States Schedule to Annex 302.2 of the Agreement in the duty imposed on such article;

(B) an increase in the rate of duty imposed on such article to a level that does not exceed the lesser of—

(i) the column 1 general rate of duty imposed under the HTS on like articles at the time the import relief is provided, or

(ii) the column 1 general rate of duty imposed under the HTS on like articles on the day before the date on which the Agreement enters into force; or

(C) in the case of a duty applied on a seasonal basis to such article, an increase in the rate of duty imposed on the article to a level that does not exceed the column 1 general rate of duty imposed under the HTS on the article for the corresponding season immediately occurring before the date on which the Agreement enters into force.

(d) PERIOD OF RELIEF.—The import relief that the President is authorized to provide under this section may not exceed 3 years, except that, if a Canadian article or Mexican article which is the subject of the action—

(1) is provided for in an item for which the transition period of tariff elimination set out in the United States Schedule to Annex 302.2 of the Agreement is greater than 10 years; and

(2) the President determines that the affected industry has undertaken adjustment and requires an extension of the period of the import relief;

the President, after obtaining the advice of the International Trade Commission, may extend the period of the import relief for not more than 1 year, if the duty applied during the initial period of the relief is substantially reduced at the beginning of the extension period.

(e) RATE ON MEXICAN ARTICLES AFTER TERMINATION OF IMPORT RELIEF.—When import relief under this part is terminated with respect to a Mexican article—

(1) the rate of duty on that article after such termination and on or before December 31 of the year in which termination occurs shall be the rate that, according to the United States Schedule to Annex 302.2 of the Agreement for the staged elimination of the tariff, would have been in effect 1 year after the initiation of the import relief action under section 302; and

(2) the tariff treatment for that article after December 31 of the year in which termination occurs shall be, at the discretion of the President, either—

(A) the rate of duty conforming to the applicable rate set out in the United States Schedule to Annex 302.2; or

(B) the rate of duty resulting from the elimination of the tariff in equal annual stages ending on the date set out in the United States Schedule to Annex 302.2 for the elimination of the tariff.

SEC. 305. TERMINATION OF RELIEF AUTHORITY.

(a) GENERAL RULE.—Except as provided in subsection (b), no import relief may be provided under this part—

(1) in the case of a Canadian article, after December 31, 1998; or

(2) in the case of a Mexican article, after the date that is 10 years after the date on which the Agreement enters into force;

unless the article against which the action is taken is an item for which the transition period for tariff elimination set out in the United States Schedule to Annex 302.2 of the Agreement is greater than 10 years, in which case the period during which relief may be granted shall be the period of staged tariff elimination for that article.

(b) EXCEPTION.—Import relief may be provided under this part in the case of a Canadian article or Mexican article after the date on which such relief would, but for this subsection, terminate under subsection (a), but only if the Government of Canada or Mexico, as the case may be, consents to such provision.

SEC. 306. COMPENSATION AUTHORITY.

For purposes of section 123 of the Trade Act of 1974 (19 U.S.C. 2133), any import relief provided by the President under section 304 shall be treated as action taken under chapter 1 of title II of such Act.

SEC. 307. SUBMISSION OF PETITIONS.

A petition for import relief may be submitted to the International Trade Commission under—

(1) this part;

(2) chapter 1 of title II of the Trade Act of 1974; or

(3) under both this part and such chapter 1 at the same time, in which case the International Trade Commission shall consider such petitions jointly.

SEC. 308. SPECIAL TARIFF PROVISIONS FOR CANADIAN FRESH FRUITS AND VEGETABLES.

(a) IN GENERAL.—Section 301(a) of the United States-Canada Free-Trade Agreement Implementation Act of 1988 (19 U.S.C. 2112 note) is amended—

(1) in paragraph (1), by striking “promptly” in the flush sentence at the end thereof and inserting “immediately”,

(2) by redesignating paragraphs (2) through (9) as paragraphs (3) through (10), respectively,

(3) by inserting after paragraph (1) the following new paragraph:

“(2) No later than 6 days after publication in the Federal Register of the notice described in paragraph (1), the Secretary shall decide whether to recommend the imposition of a temporary duty to the President, and if the Secretary decides to make such a recommendation, the recommendation shall be forwarded immediately to the President.”,

(4) in paragraph (5), as redesignated by paragraph (2), by striking “paragraph (3)” and inserting “paragraph (4)”, and

(5) by amending paragraph (9), as redesignated by paragraph (2), to read as follows:

“(9) For purposes of assisting the Secretary in carrying out this subsection—

“(A) the Commissioner of Customs and the Director of the Bureau of Census shall cooperate in providing the Secretary with timely information and data relating to the importation of Canadian fresh fruits and vegetables, and

“(B) importers shall report such information relating to Canadian fresh fruits and vegetables to the Commissioner of Customs at such time and in such manner as the Commissioner requires.".

(b) EFFECTIVE DATE.—The amendments made by subsection (a) take effect on the date of the enactment of this Act.

SEC. 309. PRICE-BASED SNAPBACK FOR FROZEN CONCENTRATED ORANGE JUICE.

(a) TRIGGER PRICE DETERMINATION.—

(1) IN GENERAL.—The Secretary shall determine—

(A) each period of 5 consecutive business days in which the daily price for frozen concentrated orange juice is less than the trigger price; and

(B) for each period determined under subparagraph (A), the first period occurring thereafter of 5 consecutive business days in which the daily price for frozen concentrated orange juice is greater than the trigger price.

(2) NOTICE OF DETERMINATIONS.—The Secretary shall immediately notify the Commissioner of Customs and publish notice in the Federal Register of any determination under paragraph (1), and the date of such publication shall be the determination date for that determination.

(b) IMPORTS OF MEXICAN ARTICLES.—Whenever after any determination date for a determination under subsection (a)(1)(A), the quantity of Mexican articles of frozen concentrated orange juice that is entered exceeds—

(1) 264,978,000 liters (single strength equivalent) in any of calendar years 1994 through 2002; or

(2) 340,560,000 liters (single strength equivalent) in any of calendar years 2003 through 2007;

the rate of duty on Mexican articles of frozen concentrated orange juice that are entered after the date on which the applicable limitation in paragraph (1) or (2) is reached and before the determination date for the related determination under subsection (a)(1)(B) shall be the rate of duty specified in subsection (c).

(c) RATE OF DUTY.—The rate of duty specified for purposes of subsection (b) for articles entered on any day is the rate in the HTS that is the lower of—

(1) the column 1–General rate of duty in effect for such articles on July 1, 1991; or

(2) the column 1–General rate of duty in effect on that day.

(d) DEFINITIONS.—For purposes of this section—

(1) The term "daily price" means the daily closing price of the New York Cotton Exchange, or any successor as determined by the Secretary, for the closest month in which contracts for frozen concentrated orange juice are being traded on the Exchange.

(2) The term "business day" means a day in which contracts for frozen concentrated orange juice are being traded on the New York Cotton Exchange, or any successor as determined by the Secretary.

(3) The term "entered" means entered or withdrawn from warehouse for consumption, in the customs territory of the United States.

(4) The term "frozen concentrated orange juice" means all products classifiable under subheading 2009.11.00 of the HTS.

(5) The term "Secretary" means the Secretary of Agriculture.

(6) The term "trigger price" means the average daily closing price of the New York Cotton Exchange, or any successor as determined by the Secretary, for the corresponding month during the previous 5-year period, excluding the year with the highest average price for the corresponding month and the year with the lowest average price for the corresponding month.

PART 2—RELIEF FROM IMPORTS FROM ALL COUNTRIES

SEC. 311. NAFTA ARTICLE IMPACT IN IMPORT RELIEF CASES UNDER THE TRADE ACT OF 1974.

(a) IN GENERAL.—If, in any investigation initiated under chapter 1 of title II of the Trade Act of 1974, the International Trade Commission makes an affirmative determination (or a determination which the President may treat as an affirmative determination under such chapter by reason of section 330(d) of the Tariff Act of 1930), the International Trade Commission shall also find (and report to the President at the time such injury determination is submitted to the President) whether—

(1) imports of the article from a NAFTA country, considered individually, account for a substantial share of total imports; and

(2) imports of the article from a NAFTA country, considered individually or, in exceptional circumstances, imports from NAFTA countries considered collectively, contribute importantly to the serious injury, or threat thereof, caused by imports.

(b) FACTORS.—

(1) SUBSTANTIAL IMPORT SHARE.—In determining whether imports from a NAFTA country, considered individually, account for a substantial share of total imports, such imports normally shall not be considered to account for a substantial share of total imports if that country is not among the top 5 suppliers of the article subject to the investigation, measured in terms of import share during the most recent 3-year period.

(2) APPLICATION OF "CONTRIBUTE IMPORTANTLY" STANDARD.—In determining whether imports from a NAFTA country or countries contribute importantly to the serious injury, or threat thereof, the International Trade Commission shall consider such factors as the change in the import share of the NAFTA country or countries, and the level and change in the level of imports of such country or countries. In applying the preceding sentence, imports from a NAFTA country or countries normally shall not be considered to contribute importantly to serious injury, or the threat thereof, if the growth rate of imports from such country or countries during the period in which an injurious increase in imports occurred is appreciably lower than the growth rate of total imports from all sources over the same period.

(c) DEFINITION.—For purposes of this section and section 312(a), the term "contribute importantly" refers to an important cause, but not necessarily the most important cause.

SEC. 312. PRESIDENTIAL ACTION REGARDING NAFTA IMPORTS.

(a) IN GENERAL.—In determining whether to take action under chapter 1 of title II of the Trade Act of 1974 with respect to imports from a NAFTA country, the President shall determine whether—

(1) imports from such country, considered individually, account for a substantial share of total imports; or

(2) imports from a NAFTA country, considered individually, or in exceptional circumstances imports from NAFTA countries considered collectively, contribute importantly to the serious injury, or threat thereof, found by the International Trade Commission.

(b) EXCLUSION OF NAFTA IMPORTS.—In determining the nature and extent of action to be taken under chapter 1 of title II of the Trade Act of 1974, the President shall exclude from such action imports from a NAFTA country if the President makes a negative determination under subsection (a) (1) or (2) with respect to imports from such country.

(c) ACTION AFTER EXCLUSION OF NAFTA COUNTRY IMPORTS.—

(1) IN GENERAL.—If the President, under subsection (b), excludes imports from a NAFTA country or countries from action under chapter 1 of title II of the Trade Act of 1974 but thereafter determines that a surge in imports from that country or countries is undermining the effectiveness of the action—

(A) the President may take appropriate action under such chapter 1 to include those imports in the action; and

(B) any entity that is representative of an industry for which such action is being taken may request the International Trade Commission to conduct an investigation of the surge in such imports.

(2) INVESTIGATION.—Upon receiving a request under paragraph (1)(B), the International Trade Commission shall conduct an investigation to determine whether a surge in such imports undermines the effectiveness of the action. The International Trade Commission shall submit the findings of its investigation to the President no later than 30 days after the request is received by the International Trade Commission.

(3) DEFINITION.—For purposes of this subsection, the term "surge" means a significant increase in imports over the trend for a recent representative base period.

(d) CONDITION APPLICABLE TO QUANTITATIVE RESTRICTIONS.—Any action taken under this section proclaiming a quantitative restriction shall permit the importation of a quantity or value of the article which is not less than the quantity or value of such article imported into the United States during the most recent period that is representative of imports of such article, with allowance for reasonable growth.

PART 3—GENERAL PROVISIONS

SEC. 315. PROVISIONAL RELIEF.

Section 202(d) of the Trade Act of 1974 (19 U.S.C. 2252(d)) is amended—

(1) in paragraph (1)(A) by inserting "or citrus product" after "agricultural product" each place it appears;

(2) in the text of paragraph (1)(C) that appears before subclauses (I) and (II)—

(A) by inserting "or citrus product" after "agricultural product" each place it appears, and

(B) by inserting "or citrus product" after "perishable product";

(3) by redesignating subparagraphs (A) and (B) of paragraph (5) as subparagraphs (B) and (C); and

(4) by inserting a new subparagraph (A) in paragraph (5) to read as follows:

"(A) The term 'citrus product' means any processed oranges or grapefruit, or any orange or grapefruit juice, including concentrate.".

SEC. 316. MONITORING.

For purposes of expediting an investigation concerning provisional relief under this subtitle or section 202 of the Trade Act of 1974 regarding—

(1) fresh or chilled tomatoes provided for in subheading 0702.00.00 of the HTS; and

(2) fresh or chilled peppers, other than chili peppers provided for in subheading 0709.60.00 of the HTS;

the International Trade Commission, until January 1, 2009, shall monitor imports of such goods as if proper requests for such monitoring had been made under subsection 202(d)(1)(C)(i) of such section 202. At the request of the International Trade Commission, the Secretary of Agriculture and the Commissioner of Customs shall provide to the International Trade Commission information relevant to the monitoring carried out under this section.

SEC. 317. PROCEDURES CONCERNING THE CONDUCT OF INTERNATIONAL TRADE COMMISSION INVESTIGATIONS.

(a) PROCEDURES AND RULES.—The International Trade Commission shall adopt such procedures and rules and regulations as are necessary to bring its procedures into conformity with chapter 8 of the Agreement.

(b) CONFORMING AMENDMENT.—Section 202(a) of the Trade Act of 1974 is amended by adding at the end thereof the following:

"(8) The procedures concerning the release of confidential business information set forth in section 332(g) of the Tariff Act of 1930 shall apply with respect to information received by the Commission in the course of investigations conducted under this chapter and part 1 of title III of the North American Free Trade Agreement Implementation Act.".

SEC. 318. EFFECTIVE DATE.

Except as provided in section 308(b), the provisions of this subtitle take effect on the date the Agreement enters into force with respect to the United States.

Subtitle B—Agriculture

SEC. 321. AGRICULTURE.

(a) MEAT IMPORT ACT OF 1979.—The Meat Import Act of 1979 (19 U.S.C. 2253 note) is amended—

(1) in subsection (b)—

(A) by striking the last sentence in paragraph (2),

(B) by redesignating paragraph (3) as paragraph (4) and inserting after paragraph (2) the following new paragraph:

"(3) The term 'meat articles' does not include any article described in paragraph (2) that—

"(A) originates in a NAFTA country (as determined in accordance with section 202 of the NAFTA Act), or

"(B) originates in Canada (as determined in accordance with section 202 of the United States-Canada Free-Trade Agreement Implementation Act of 1988) during such time as the United States-Canada Free-Trade Agreement is in force with respect to, and the United States applies such Agreement to, Canada."; and

(C) by inserting after paragraph (4) (as redesignated by subparagraph (B) of this paragraph) the following new paragraphs:

"(5) The term 'NAFTA Act' means the North American Free Trade Agreement Implementation Act.

"(6) The term 'NAFTA country' has the meaning given such term in section 2(4) of the NAFTA Act.";

(2) in subsection (f)(1), by striking the end period and inserting ", except that the President may exclude any such article originating in a NAFTA country (as determined in accordance with section 202 of the NAFTA Act) or, if paragraph (3)(B) applies, any such article originating in Canada as determined in accordance with such paragraph (3)(B)."; and

(3) in subsection (i), by inserting "and Mexico" after "Canada" each place it appears.

(b) SECTION 22 OF THE AGRICULTURAL ADJUSTMENT ACT.—

(1) IN GENERAL.—The President may, pursuant to article 309 and Annex 703.2 of the Agreement, exempt from any quantitative limitation or fee imposed pursuant to section 22 of the Agricultural Adjustment Act (7 U.S.C. 624), reenacted with amendments by the Agricultural Marketing Agreement Act of 1937, any article which originates in Mexico, if Mexico is a NAFTA country.

(2) QUALIFICATION OF ARTICLES.—The determination of whether an article originates in Mexico shall be made in accordance with section 202, except that operations performed in, or materials obtained from, any country other than the United States or Mexico shall be treated as if performed in or obtained from a country other than a NAFTA country.

(c) TARIFF RATE QUOTAS.—In implementing the tariff rate quotas set out in the United States Schedule to Annex 302.2 of the Agreement, the President shall take such action as may be necessary to ensure that imports of agricultural goods do not disrupt the orderly marketing of commodities in the United States.

(d) PEANUTS.—

(1) EFFECT OF THE AGREEMENT.—

(A) IN GENERAL.—Nothing in the Agreement or this Act reduces or eliminates—

(i) any penalty required under section 358e(d) of the Agricultural Adjustment Act of 1938 (7 U.S.C. 1359a(d)); or

(ii) any requirement under Marketing Agreement No. 146, Regulating the Quality of Domestically Produced Peanuts, on peanuts in the domestic market, pursuant to section 108B(f) of the Agricultural Act of 1949 (7 U.S.C. 1445c–3(f)).

(B) REENTRY OF EXPORTED PEANUTS.—Paragraph (6) of section 358e(d) of the Agricultural Adjustment Act of 1938 (7 U.S.C. 1359a(d)(6)) is amended to read as follows:

"(6) REENTRY OF EXPORTED PEANUTS.—

"(A) PENALTY.—If any additional peanuts exported by a handler are reentered into the United States in commercial quantities as determined by the Secretary, the importer of the peanuts shall be subject to a penalty at a rate equal to 140 percent of the loan level for quota peanuts on the quantity of peanuts reentered.

"(B) RECORDS.—Each person, firm, or handler who imports peanuts into the United States shall maintain such records and documents as are required by the Secretary to ensure compliance with this subsection.".

(2) CONSULTATIONS ON IMPORTS.—It is the sense of Congress that the United States should request consultations in the Working Group on Emergency Action, established in the Understanding Between the Parties to the North American Free Trade Agreement Concerning Chapter Eight—Emergency Action, if imports of peanuts exceed the in-quota quantity under a tariff rate quota set out in the United States Schedule to Annex 302.2 of the Agreement concerning whether—

(A) the increased imports of peanuts constitute a substantial cause of, or contribute importantly to, serious injury, or threat of serious injury, to the domestic peanut industry; and

(B) recourse under Chapter Eight of the Agreement or Article XIX of the General Agreement on Tariffs and Trade is appropriate.

(e) FRESH FRUITS, VEGETABLES, AND CUT FLOWERS.—

(1) IN GENERAL.—The Secretary of Agriculture shall collect and compile the information specified under paragraph (3), if reasonably available, from appropriate Federal departments and agencies and the relevant counterpart ministries of the Government of Mexico.

(2) DESIGNATION OF AN OFFICE.—The Secretary of Agriculture shall designate an office within the United States Department of Agriculture to be responsible for maintaining and disseminating, in a timely manner, the data accumulated for verifying citrus, fruit, vegetable, and cut flower trade between the United States and Mexico. The information shall be made available to the public and the NAFTA Agriculture Committee Working Groups.

(3) INFORMATION COLLECTED.—The information to be collected, if reasonably available, includes—

(A) monthly fresh fruit, fresh vegetable, fresh citrus, and processed citrus product import and export data;

(B) monthly citrus juice production and export data;

(C) data on inspections of shipments of citrus, vegetables, and cut flowers entering the United States from Mexico; and

(D) in the case of fruits, vegetables, and cut flowers entering the United States from Mexico, data regarding—

(i) planted and harvested acreage; and

(ii) wholesale prices, quality, and grades.

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(f) END-USE CERTIFICATES.—

(1) IN GENERAL.—The Secretary of Agriculture (referred to in this subsection as the "Secretary") shall implement, in coordination with the Commissioner of Customs, a program requiring that end-use certificates be included in the documentation covering the entry into, or the withdrawal from a warehouse for consumption in, the customs territory of the United States—

(A) of any wheat that is a product of any foreign country or instrumentality that requires, as of the effective date of this subsection, end-use certificates for imports of wheat that is a product of the United States (referred to in this subsection as "United States-produced wheat"); and

(B) of any barley that is a product of any foreign country or instrumentality that requires, as of the effective date of this subsection, end-use certificates for imports of barley that is a product of the United States (referred to in this subsection as "United States-produced barley").

(2) REGULATIONS.—The Secretary shall prescribe by regulation such requirements regarding the information to be included in end-use certificates as may be necessary and appropriate to carry out this subsection.

(3) PRODUCER PROTECTION DETERMINATION.—At any time after the effective date of the requirements established under paragraph (1), the Secretary may, subject to paragraph (5), suspend the requirements when making a determination, after consultation with domestic producers, that the program implemented under this subsection has directly resulted in—

(A) the reduction of income to the United States producers of agricultural commodities; or

(B) the reduction of the competitiveness of United States agricultural commodities in the world export markets.

(4) SUSPENSION OF REQUIREMENTS.—

(A) WHEAT.—If a foreign country or instrumentality that requires end-use certificates for imports of United States-produced wheat as of the effective date of the requirement under paragraph (1)(A) eliminates the requirement, the Secretary shall suspend the requirement under paragraph (1)(A) beginning 30 calendar days after suspension by the foreign country or instrumentality.

(B) BARLEY.—If a foreign country or instrumentality that requires end-use certificates for imports of United States-produced barley as of the effective date of the requirement under paragraph (1)(B) eliminates the requirement, the Secretary shall suspend the requirement under paragraph (1)(B) beginning 30 calendar days after suspension by the foreign country or instrumentality.

(5) REPORT TO CONGRESS.—The Secretary shall not suspend the requirements established under paragraph (1) under circumstances identified in paragraph (3) before the Secretary submits a report to Congress detailing the determination made under paragraph (3) and the reasons for making the determination.

(6) COMPLIANCE.—It shall be a violation of section 1001 of title 18, United States Code, for a person to engage in

fraud or knowingly violate this subsection or a regulation implementing this subsection.

(7) EFFECTIVE DATE.—This subsection shall become effective on the date that is 120 days after the date of enactment of this Act.

(g) AGRICULTURAL FELLOWSHIP PROGRAM.—Section 1542(d) of the Food, Agriculture, Conservation, and Trade Act of 1990 (Public Law 101–624; 7 U.S.C. 5622 note) is amended by adding at the end the following new paragraph:

"(3) AGRICULTURAL FELLOWSHIPS FOR NAFTA COUNTRIES.—

"(A) IN GENERAL.—The Secretary shall grant fellowships to individuals from countries that are parties to the North American Free Trade Agreement (referred to in this paragraph as 'NAFTA') to study agriculture in the United States, and to individuals in the United States to study agriculture in other NAFTA countries.

"(B) PURPOSE.—The purpose of fellowships granted under this paragraph is—

"(i) to allow the recipients to expand their knowledge and understanding of agricultural systems and practices in other NAFTA countries;

"(ii) to facilitate the improvement of agricultural systems in NAFTA countries; and

"(iii) to establish and expand agricultural trade linkages between the United States and other NAFTA countries.

"(C) ELIGIBLE RECIPIENTS.—The Secretary may provide fellowships under this paragraph to agricultural producers and consultants, government officials, and other individuals from the private and public sectors.

"(D) ACCEPTANCE OF GIFTS.—The Secretary may accept money, funds, property, and services of every kind by gift, devise, bequest, grant, or otherwise, and may in any manner, dispose of all of the holdings and use the receipts generated from the disposition to carry out this paragraph. Receipts under this paragraph shall remain available until expended.

"(E) AUTHORIZATION OF APPROPRIATION.—There are authorized to be appropriated such sums as are necessary to carry out this paragraph.".

(h) ASSISTANCE FOR AFFECTED FARMWORKERS.—

(1) IN GENERAL.—Subject to paragraph (3), if at any time the Secretary of Agriculture determines that the implementation of the Agreement has caused low-income migrant or seasonal farmworkers to lose income, the Secretary may make available grants, not to exceed $20,000,000 for any fiscal year, to public agencies or private organizations with tax-exempt status under section 501(c)(3) of the Internal Revenue Code of 1986, that have experience in providing emergency services to low-income migrant or seasonal farmworkers. Emergency services to be provided with assistance received under this subsection may include such types of assistance as the Secretary determines to be necessary and appropriate.

(2) DEFINITION.—As used in this subsection, the term "low-income migrant or seasonal farmworker" shall have the same meaning as provided in section 2281(b) of the Food, Agriculture, Conservation, and Trade Act of 1990 (42 U.S.C. 5177a(b)).

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(3) AUTHORIZATION OF APPROPRIATIONS.—There are authorized to be appropriated $20,000,000 for each fiscal year to carry out this subsection.

(i) BIENNIAL REPORT ON EFFECTS OF THE AGREEMENT ON AMERICAN AGRICULTURE.—

(1) IN GENERAL.—The Secretary of Agriculture shall prepare a biennial report on the effects of the Agreement on United States producers of agricultural commodities and on rural communities located in the United States.

(2) CONTENTS OF REPORT.—The report required under this subsection shall include—

(A) an assessment of the effects of implementing the Agreement on the various agricultural commodities affected by the Agreement, on a commodity-by-commodity basis;

(B) an assessment of the effects of implementing the Agreement on investments made in United States agriculture and on rural communities located in the United States;

(C) an assessment of the effects of implementing the Agreement on employment in United States agriculture, including any gains or losses of jobs in businesses directly or indirectly related to United States agriculture; and

(D) such other information and data as the Secretary determines appropriate.

(3) SUBMISSION OF REPORT.—The Secretary shall furnish the report required under this subsection to the Committee on Agriculture, Nutrition, and Forestry of the Senate and to the Committee on Agriculture of the House of Representatives. The report shall be due every 2 years and shall be submitted by March 1 of the year in which the report is due. The first report shall be due by March 1, 1997, and the final report shall be due by March 1, 2011.

Subtitle C—Intellectual Property

SEC. 331. TREATMENT OF INVENTIVE ACTIVITY.

Section 104 of title 35, United States Code, is amended to read as follows:

"§ 104. Invention made abroad

"(a) IN GENERAL.—In proceedings in the Patent and Trademark Office, in the courts, and before any other competent authority, an applicant for a patent, or a patentee, may not establish a date of invention by reference to knowledge or use thereof, or other activity with respect thereto, in a foreign country other than a NAFTA country, except as provided in sections 119 and 365 of this title. Where an invention was made by a person, civil or military, while domiciled in the United States or a NAFTA country and serving in any other country in connection with operations by or on behalf of the United States or a NAFTA country, the person shall be entitled to the same rights of priority in the United States with respect to such invention as if such invention had been made in the United States or a NAFTA country. To the extent that any information in a NAFTA country concerning knowledge, use, or other activity relevant to proving or disproving a date of invention has not been made available for use in a proceeding in the Office, a court, or any other competent authority to the same extent as such information could be made available in the United States, the Commissioner, court, or such other authority shall draw appropriate inferences, or take other action permitted by statute, rule, or regulation, in favor of the party that requested the information in the proceeding.

"(b) DEFINITION.—As used in this section, the term 'NAFTA country' has the meaning given that term in section 2(4) of the North American Free Trade Agreement Implementation Act.".

SEC. 332. RENTAL RIGHTS IN SOUND RECORDINGS.

Section 4 of the Record Rental Amendment of 1984 (17 U.S.C. 109 note) is amended by striking out subsection (c).

SEC. 333. NONREGISTRABILITY OF MISLEADING GEOGRAPHIC INDICATIONS.

(a) MARKS NOT REGISTRABLE ON THE PRINCIPAL REGISTER.—Section 2 of the Act entitled "An Act to provide for the registration and protection of trademarks used in commerce, to carry out the provisions of certain international conventions, and for other purposes", approved July 5, 1946, commonly referred to as the Trademark Act of 1946 (15 U.S.C. 1052(e)), is amended—

(1) by amending subsection (e) to read as follows:

"(e) Consists of a mark which (1) when used on or in connection with the goods of the applicant is merely descriptive or deceptively misdescriptive of them, (2) when used on or in connection with the goods of the applicant is primarily geographically descriptive of them, except as indications of regional origin may be registrable under section 4, (3) when used on or in connection with the goods of the applicant is primarily geographically deceptively misdescriptive of them, or (4) is primarily merely a surname."; and

(2) in subsection (f)—

(A) by striking out "and (d)" and inserting "(d), and (e)(3)"; and

(B) by adding at the end the following new sentence: "Nothing in this section shall prevent the registration of a mark which, when used on or in connection with the goods of the applicant, is primarily geographically deceptively misdescriptive of them, and which became distinctive of the applicant's goods in commerce before the date of the enactment of the North American Free Trade Agreement Implementation Act.".

(b) SUPPLEMENTAL REGISTER.—Section 23(a) of the Trademark Act of 1946 (15 U.S.C. 1091(a)) is amended—

(1) by striking out "and (d)" and inserting "(d), and (e)(3)"; and

(2) by adding at the end the following new sentence: "Nothing in this section shall prevent the registration on the supplemental register of a mark, capable of distinguishing the applicant's goods or services and not registrable on the principal register under this Act, that is declared to be unregistrable under section 2(e)(3), if such mark has been in lawful use in commerce by the owner thereof, on or in connection with any goods or services, since before the date of the enactment of the North American Free Trade Agreement Implementation Act.".

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SEC. 334. MOTION PICTURES IN THE PUBLIC DOMAIN.

(a) IN GENERAL.—Chapter 1 of title 17, United States Code, is amended by inserting after section 104 the following new section:

"§ 104A. Copyright in certain motion pictures

"(a) RESTORATION OF COPYRIGHT.—Subject to subsections (b) and (c)—

"(1) any motion picture that is first fixed or published in the territory of a NAFTA country as defined in section 2(4) of the North American Free Trade Agreement Implementation Act to which Annex 1705.7 of the North American Free Trade Agreement applies, and

"(2) any work included in such motion picture that is first fixed in or published with such motion picture,

that entered the public domain in the United States because it was first published on or after January 1, 1978, and before March 1, 1989, without the notice required by section 401, 402, or 403 of this title, the absence of which has not been excused by the operation of section 405 of this title, as such sections were in effect during that period, shall have copyright protection under this title for the remainder of the term of copyright protection to which it would have been entitled in the United States had it been published with such notice.

"(b) EFFECTIVE DATE OF PROTECTION.—The protection provided under subsection (a) shall become effective, with respect to any motion picture or work included in such motion picture meeting the criteria of that subsection, 1 year after the date on which the North American Free Trade Agreement enters into force with respect to, and the United States applies the Agreement to, the country in whose territory the motion picture was first fixed or published if, before the end of that 1-year period, the copyright owner in the motion picture or work files with the Copyright Office a statement of intent to have copyright protection restored under subsection (a). The Copyright Office shall publish in the Federal Register promptly after that effective date a list of motion pictures, and works included in such motion pictures, for which protection is provided under subsection (a).

"(c) USE OF PREVIOUSLY OWNED COPIES.—A national or domiciliary of the United States who, before the date of the enactment of the North American Free Trade Agreement Implementation Act, made or acquired copies of a motion picture, or other work included in such motion picture, that is subject to protection under subsection (a), may sell or distribute such copies or continue to perform publicly such motion picture and other work without liability for such sale, distribution, or performance, for a period of 1 year after the date on which the list of motion pictures, and works included in such motion pictures, that are subject to protection under subsection (a) is published in the Federal Register under subsection (b).".

(b) CONFORMING AMENDMENT.—The table of sections at the beginning of chapter 1 of title 17, United States Code, is amended by inserting after the item relating to section 104 the following new item:

"104A. Copyright in certain motion pictures.".

SEC. 335. EFFECTIVE DATES.

(a) IN GENERAL.—Subject to subsections (b) and (c), the amendments made by this subtitle take effect on the date the Agreement enters into force with respect to the United States.

(b) SECTION 331.—The amendments made by section 331 shall apply to all patent applications that are filed on or after the date of the enactment of this Act: *Provided*, That an applicant for a patent, or a patentee, may not establish a date of invention by reference to knowledge or use thereof, or other activity with respect thereto, in a NAFTA country, except as provided in sections 119 and 365 of title 35, United States Code, that is earlier than the date of the enactment of this Act.

(c) SECTION 333.—The amendments made by section 333 shall apply only to trademark applications filed on or after the date of the enactment of this Act.

Subtitle D—Temporary Entry of Business Persons

SEC. 341. TEMPORARY ENTRY.

(a) NONIMMIGRANT TRADERS AND INVESTORS.—Upon a basis of reciprocity secured by the Agreement, an alien who is a citizen of Canada or Mexico, and the spouse and children of any such alien if accompanying or following to join such alien, may, if otherwise eligible for a visa and if otherwise admissible into the United States under the Immigration and Nationality Act (8 U.S.C. 1101 et seq.), be considered to be classifiable as a nonimmigrant under section 101(a)(15)(E) of such Act (8 U.S.C. 1101(a)(15)(E)) if entering solely for a purpose specified in Section B of Annex 1603 of the Agreement, but only if any such purpose shall have been specified in such Annex on the date of entry into force of the Agreement. For purposes of this section, the term "citizen of Mexico" means "citizen" as defined in Annex 1608 of the Agreement.

(b) NONIMMIGRANT PROFESSIONALS AND ANNUAL NUMERICAL LIMIT.—Section 214 of the Immigration and Nationality Act (8 U.S.C. 1184) is amended by redesignating subsection (e) as paragraph (1) of subsection (e) and adding after such paragraph (1), as redesignated, the following new paragraphs:

"(2) An alien who is a citizen of Canada or Mexico, and the spouse and children of any such alien if accompanying or following to join such alien, who seeks to enter the United States under and pursuant to the provisions of Section D of Annex 1603 of the North American Free Trade Agreement (in this subsection referred to as 'NAFTA') to engage in business activities at a professional level as provided for in such Annex, may be admitted for such purpose under regulations of the Attorney General promulgated after consultation with the Secretaries of State and Labor. For purposes of this Act, including the issuance of entry documents and the application of subsection (b), such alien shall be treated as if seeking classification, or classifiable, as a nonimmigrant under section 101(a)(15). The admission of an alien who is a citizen of Mexico shall be subject to paragraphs (3), (4), and (5). For purposes of this paragraph and paragraphs (3), (4), and (5), the term 'citizen of Mexico' means 'citizen' as defined in Annex 1608 of NAFTA.

"(3) The Attorney General shall establish an annual numerical limit on admissions under paragraph (2) of aliens who are citizens of Mexico, as set forth in Appendix 1603.D.4 of Annex 1603 of the NAFTA. Subject to paragraph (4), the annual numerical limit—

"(A) beginning with the second year that NAFTA is in force, may be increased in accordance with the provisions of paragraph 5(a) of Section D of such Annex, and

"(B) shall cease to apply as provided for in paragraph 3 of such Appendix.

"(4) The annual numerical limit referred to in paragraph (3) may be increased or shall cease to apply (other than by operation of paragraph 3 of such Appendix) only if—

"(A) the President has obtained advice regarding the proposed action from the appropriate advisory committees established under section 135 of the Trade Act of 1974 (19 U.S.C. 2155);

"(B) the President has submitted a report to the Committee on the Judiciary of the Senate and the Committee on the Judiciary of the House of Representatives that sets forth—

"(i) the action proposed to be taken and the reasons therefor, and

"(ii) the advice obtained under subparagraph (A);

"(C) a period of at least 60 calendar days that begins on the first day on which the President has met the requirements of subparagraphs (A) and (B) with respect to such action has expired; and

"(D) the President has consulted with such committees regarding the proposed action during the period referred to in subparagraph (C).

"(5) During the period that the provisions of Appendix 1603.D.4 of Annex 1603 of the NAFTA apply, the entry of an alien who is a citizen of Mexico under and pursuant to the provisions of Section D of Annex 1603 of NAFTA shall be subject to the attestation requirement of section 212(m), in the case of a registered nurse, or the application requirement of section 212(n), in the case of all other professions set out in Appendix 1603.D.1 of Annex 1603 of NAFTA, and the petition requirement of subsection (c), to the extent and in the manner prescribed in regulations promulgated by the Secretary of Labor, with respect to sections 212(m) and 212(n), and the Attorney General, with respect to subsection (c).".

(c) LABOR DISPUTES.—Section 214 of the Immigration and Nationality Act (8 U.S.C. 1184) is amended by adding at the end the following new subsection:

"(j) Notwithstanding any other provision of this Act, an alien who is a citizen of Canada or Mexico who seeks to enter the United States under and pursuant to the provisions of Section B, Section C, or Section D of Annex 1603 of the North American Free Trade Agreement, shall not be classified as a nonimmigrant under such provisions if there is in progress a strike or lockout in the course of a labor dispute in the occupational classification at the place or intended place of employment, unless such alien establishes, pursuant to regulations promulgated by the Attorney General, that the alien's entry will not affect adversely the settlement of the strike or lockout or the employment of any person who is involved in the strike or lockout. Notice of a determination under this subsection shall be given as may be required by paragraph 3 of article 1603 of such Agreement. For purposes of this subsection, the term 'citizen of Mexico' means 'citizen' as defined in Annex 1608 of such Agreement.".

SEC. 342. EFFECTIVE DATE.

The provisions of this subtitle take effect on the date the Agreement enters into force with respect to the United States.

Subtitle E—Standards

PART 1—STANDARDS AND MEASURES

SEC. 351. STANDARDS AND SANITARY AND PHYTOSANITARY MEASURES.

(a) IN GENERAL.—Title IV of the Trade Agreements Act of 1979 (19 U.S.C. 2531 et seq.) is amended by inserting at the end the following new subtitle:

"Subtitle E—Standards and Measures Under the North American Free Trade Agreement

"CHAPTER 1—SANITARY AND PHYTOSANITARY MEASURES

"SEC. 461. GENERAL.

"Nothing in this chapter may be construed—

"(1) to prohibit a Federal agency or State agency from engaging in activity related to sanitary or phytosanitary measures to protect human, animal, or plant life or health; or

"(2) to limit the authority of a Federal agency or State agency to determine the level of protection of human, animal, or plant life or health the agency considers appropriate.

"SEC. 462. INQUIRY POINT.

"The standards information center maintained under section 414 shall, in addition to the functions specified therein, make available to the public relevant documents, at such reasonable fees as the Secretary of Commerce may prescribe, and information regarding—

"(1) any sanitary or phytosanitary measure of general application, including any control or inspection procedure or approval procedure proposed, adopted, or maintained by a Federal or State agency;

"(2) the procedures of a Federal or State agency for risk assessment, and factors the agency considers in conducting the assessment and in establishing the levels of protection that the agency considers appropriate;

"(3) the membership and participation of the Federal Government and State governments in international and regional sanitary and phytosanitary organizations and systems, and in bilateral and multilateral arrangements regarding sanitary and phytosanitary measures, and the provisions of those systems and arrangements; and

"(4) the location of notices of the type required under article 719 of the NAFTA, or where the information contained in such notices can be obtained.

"SEC. 463. CHAPTER DEFINITIONS.

"Notwithstanding section 451, for purposes of this chapter—

"(1) ANIMAL.—The term 'animal' includes fish, bees, and wild fauna.

"(2) APPROVAL PROCEDURE.—The term 'approval procedure' means any registration, notification, or other mandatory administrative procedure for—

"(A) approving the use of an additive for a stated purpose or under stated conditions, or

"(B) establishing a tolerance for a stated purpose or under stated conditions for a contaminant,

in a food, beverage, or feedstuff prior to permitting the use of the additive or the marketing of a food, beverage, or feedstuff containing the additive or contaminant.

"(3) CONTAMINANT.—The term 'contaminant' includes pesticide and veterinary drug residues and extraneous matter.

"(4) CONTROL OR INSPECTION PROCEDURE.—The term 'control or inspection procedure' means any procedure used, directly or indirectly, to determine that a sanitary or phytosanitary measure is fulfilled, including sampling, testing, inspection, evaluation, verification, monitoring, auditing, assurance of conformity, accreditation, registration, certification, or other procedure involving the physical examination of a good, of the packaging of a good, or of the equipment or facilities directly related to production, marketing, or use of a good, but does not mean an approval procedure.

"(5) PLANT.—The term 'plant' includes wild flora.

"(6) RISK ASSESSMENT.—The term 'risk assessment' means an evaluation of—

"(A) the potential for the introduction, establishment or spread of a pest or disease and associated biological and economic consequences; or

"(B) the potential for adverse effects on human or animal life or health arising from the presence of an additive, contaminant, toxin or disease-causing organism in a food, beverage, or feedstuff.

"(7) SANITARY OR PHYTOSANITARY MEASURE.—

"(A) IN GENERAL.—The term 'sanitary or phytosanitary measure' means a measure to—

"(i) protect animal or plant life or health in the United States from risks arising from the introduction, establishment, or spread of a pest or disease;

"(ii) protect human or animal life or health in the United States from risks arising from the presence of an additive, contaminant, toxin, or disease-causing organism in a food, beverage, or feedstuff;

"(iii) protect human life or health in the United States from risks arising from a disease-causing organism or pest carried by an animal or plant, or a product thereof; or

"(iv) prevent or limit other damage in the United States arising from the introduction, establishment, or spread of a pest.

"(B) FORM.—The form of a sanitary or phytosanitary measure includes—

"(i) end product criteria;

"(ii) a product-related processing or production method;

"(iii) a testing, inspection, certification, or approval procedure;

"(iv) a relevant statistical method;

"(v) a sampling procedure;

"(vi) a method of risk assessment;

"(vii) a packaging and labeling requirement directly related to food safety; and

"(viii) a quarantine treatment, such as a relevant requirement associated with the transportation of animals or plants or with material necessary for their survival during transportation.

"CHAPTER 2—STANDARDS-RELATED MEASURES

"SEC. 471. GENERAL.

"(a) NO BAR TO ENGAGING IN STANDARDS ACTIVITY.—Nothing in this chapter shall be construed—

"(1) to prohibit a Federal agency from engaging in activity related to standards-related measures, including any such measure relating to safety, the protection of human, animal, or plant life or health, the environment or consumers; or

"(2) to limit the authority of a Federal agency to determine the level it considers appropriate of safety or of protection of human, animal, or plant life or health, the environment or consumers.

"(b) EXCLUSION.—This chapter does not apply to—

"(1) technical specifications prepared by a Federal agency for production or consumption requirements of the agency; or

"(2) sanitary or phytosanitary measures under chapter 1.

"SEC. 472. INQUIRY POINT.

"The standards information center maintained under section 414 shall, in addition to the functions specified therein, make available to the public relevant documents, at such reasonable fees as the Secretary of Commerce may prescribe, and information regarding—

"(1) the membership and participation of the Federal Government, State governments, and relevant nongovernmental bodies in the United States in international and regional standardizing bodies and conformity assessment systems, and in bilateral and multilateral arrangements regarding standards-related measures, and the provisions of those systems and arrangements;

"(2) the location of notices of the type required under article 909 of the NAFTA, or where the information contained in such notice can be obtained; and

"(3) the Federal agency procedures for assessment of risk, and factors the agency considers in conducting the assessment and establishing the levels of protection that the agency considers appropriate.

"SEC. 473. CHAPTER DEFINITIONS.

"Notwithstanding section 451, for purposes of this chapter—

"(1) APPROVAL PROCEDURE.—The term 'approval procedure' means any registration, notification, or other mandatory administrative procedure for granting permission for a good or service to be produced, marketed, or used for a stated purpose or under stated conditions.

"(2) CONFORMITY ASSESSMENT PROCEDURE.—The term 'conformity assessment procedure' means any procedure used, directly or indirectly, to determine that a technical regulation or standard is fulfilled, including sampling, testing, inspection, evaluation, verification, monitoring, auditing, assurance of conformity, accreditation, registration, or approval used for such a purpose, but does not mean an approval procedure.

"(3) OBJECTIVE.—The term 'objective' includes—

"(A) safety,

"(B) protection of human, animal, or plant life or health, the environment or consumers, including matters relating to quality and identifiability of goods or services, and

"(C) sustainable development,

but does not include the protection of domestic production.

"(4) SERVICE.—The term 'service' means a land transportation service or a telecommunications service.

"(5) STANDARD.—The term 'standard' means—

"(A) characteristics for a good or a service,

"(B) characteristics, rules, or guidelines for—

"(i) processes or production methods relating to such good, or

"(ii) operating methods relating to such service, and

"(C) provisions specifying terminology, symbols, packaging, marking, or labelling for—

"(i) a good or its related process or production methods, or

"(ii) a service or its related operating methods,

for common and repeated use, including explanatory and other related provisions set out in a document approved by a standardizing body, with which compliance is not mandatory.

"(6) STANDARDS-RELATED MEASURE.—The term 'standards-related measure' means a standard, technical regulation, or conformity assessment procedure.

"(7) TECHNICAL REGULATION.—The term 'technical regulation' means—

"(A) characteristics or their related processes and production methods for a good,

"(B) characteristics for a service or its related operating methods, or

"(C) provisions specifying terminology, symbols, packaging, marking, or labelling for—

"(i) a good or its related process or production method, or

"(ii) a service or its related operating method,

set out in a document, including applicable administrative, explanatory, and other related provisions, with which compliance is mandatory.

"(8) TELECOMMUNICATIONS SERVICE.—The term 'telecommunications service' means a service provided by means of the transmission and reception of signals by any electromagnetic means, but does not mean the cable, broadcast, or other electromagnetic distribution of radio or television programming to the public generally.

"CHAPTER 3—SUBTITLE DEFINITIONS

"SEC. 481. DEFINITIONS.

"Notwithstanding section 451, for purposes of this subtitle—

"(1) NAFTA.—The term 'NAFTA' means the North American Free Trade Agreement.

"(2) STATE.—The term 'State' means any of the several States, the District of Columbia, and the Commonwealth of Puerto Rico.".

(b) TECHNICAL AMENDMENTS.—

(1) DEFINITION OF TRADE REPRESENTATIVE.—Section 451(12) of the Trade Agreements Act of 1979 is amended to read as follows:

"(12) TRADE REPRESENTATIVE.—The term 'Trade Representative' means the United States Trade Representative.".

(2) CONFORMING AMENDMENTS.—Title IV of the Trade Agreement Act of 1979 is further amended—

(A) by striking out "Special Representative" each place it appears and inserting "Trade Representative"; and

(B) in the section heading to section 411, by striking out "**SPECIAL REPRESENTATIVE**" and inserting "**TRADE REPRESENTATIVE**".

SEC. 352. TRANSPORTATION.

No regulation issued by the Secretary of Transportation implementing a recommendation of the Land Transportation Standards Subcommittee established under article 913(5)(a)(i) of the Agreement may take effect before the date 90 days after the date of issuance.

PART 2—AGRICULTURAL STANDARDS

SEC. 361. AGRICULTURAL TECHNICAL AND CONFORMING AMENDMENTS.

(a) FEDERAL SEED ACT.—Section 302(e)(1) of the Federal Seed Act (7 U.S.C. 1582(e)(1)) is amended by inserting "or Mexico" after "Canada".

(b) IMPORTATION OF ANIMALS.—The first sentence of section 6 of the Act of August 30, 1890 (26 Stat. 416, chapter 839; 21 U.S.C. 104), is amended by striking ": *Provided*" and all that follows through the period at the end of the sentence and inserting ", except that the Secretary of Agriculture, in accordance with such regulations as the Secretary may issue, may (1) permit the importation of cattle, sheep, or other ruminants, and swine, from Canada or Mexico, and (2) permit the importation from the British Virgin Islands into the Virgin Islands of the United States, for slaughter only, of cattle that have been infested with or exposed to ticks on being freed from the ticks.".

(c) INSPECTION OF ANIMALS.—Section 10 of the Act of August 30, 1890 (26 Stat. 417, chapter 839; 21 U.S.C. 105), is amended—

(1) by inserting above "SEC. 10." the following new section heading:

"SEC. 10. INSPECTION OF ANIMALS.";

(2) by striking "SEC. 10. That the Secretary of Agriculture shall" and inserting "(a) IN GENERAL.—Except as provided in subsection (b), the Secretary of Agriculture shall"; and

(3) by adding at the end the following new subsection:

"(b) EXCEPTION.—The Secretary of Agriculture, in accordance with such regulations as the Secretary may issue, may waive any provision of subsection (a) in the case of shipments between the United States and Canada or Mexico.".

(d) DISEASE-FREE COUNTRIES OR REGIONS.—

(1) TARIFF ACT OF 1930.—Section 306 of the Tariff Act of 1930 (19 U.S.C. 1306) is amended—

(A) in subsection (a), by striking "RINDERPEST AND FOOT-AND-MOUTH DISEASE.—If the Secretary of Agriculture" and inserting "IN GENERAL.—Except as provided in subsection (b), if the Secretary of Agriculture"; and

(B) by striking subsection (b) and inserting the following new subsection:

"(b) EXCEPTION.—The Secretary of Agriculture may permit, subject to such terms and conditions as the Secretary determines appropriate, the importation of cattle, sheep, other ruminants, or swine (including embryos of the animals), or the fresh, chilled, or frozen meat of the animals, from a region if the Secretary determines that the region from which the animal or meat originated is, and is likely to remain, free from rinderpest and foot-and-mouth disease.".

(2) HONEYBEE ACT.—The first section of the Act of August 31, 1922 (commonly known as the "Honeybee Act") (42 Stat. 833, chapter 301; 7 U.S.C. 281), is amended—

(A) in subsection (a)—

(i) by striking ", or" at the end of paragraph (1) and inserting a semicolon;

(ii) by striking the period at the end of paragraph (2) and inserting "; or"; and

(iii) by adding at the end the following new paragraph:

"(3) from Canada or Mexico, subject to such terms and conditions as the Secretary of Agriculture determines appropriate, if the Secretary determines that the region of Canada or Mexico from which the honeybees originated is, and is likely to remain, free of diseases or parasites harmful to honeybees, and undesirable species or subspecies of honeybees."; and

(B) in subsection (b)—

(i) by inserting "(1)" after "imported into the United States only from"; and

(ii) by inserting before the period the following: ", or (2) Canada or Mexico, if the Secretary of Agriculture determines that the region of Canada or Mexico from which the imports originate is, and is likely to remain, free of undesirable species or subspecies of honeybees".

(e) POULTRY PRODUCTS INSPECTION ACT.—Section 17(d) of the Poultry Products Inspection Act (21 U.S.C. 466(d)) is amended—

(1) in paragraph (1), by inserting after "Notwithstanding any other provision of law," the following: "except as provided in paragraph (2),";

(2) by redesignating paragraphs (2) and (3) as paragraphs (3) and (4), respectively; and

(3) by inserting after paragraph (1) the following new paragraph:

"(2)(A) Notwithstanding any other provision of law, all poultry, or parts or products of poultry, capable of use as human food offered for importation into the United States from Canada and Mexico shall—

"(i) comply with paragraph (1); or

"(ii)(I) be subject to inspection, sanitary, quality, species verification, and residue standards that are equivalent to United States standards; and

"(II) have been processed in facilities and under conditions that meet standards that are equivalent to United States standards.

"(B) The Secretary may treat as equivalent to a United States standard a standard of Canada or Mexico described in subparagraph (A)(ii) if the exporting country provides the Secretary with scientific evidence or other information, in accordance with risk assessment methodologies agreed to by the Secretary and the exporting country, to demonstrate that the standard of the exporting country achieves the level of protection that the Secretary considers appropriate.

"(C) The Secretary may—

"(i) determine, on a scientific basis, that the standard of the exporting country does not achieve the level of protection that the Secretary considers appropriate; and

"(ii) provide the basis for the determination in writing to the exporting country on request.".

(f) FEDERAL MEAT INSPECTION ACT.—Section 20(e) of the Federal Meat Inspection Act (21 U.S.C. 620(e)) is amended—

(1) by striking "not be limited to—" and inserting "not be limited to the following:";

(2) by striking paragraph (1);

(3) by redesignating paragraphs (2) through (6) as paragraphs (3) through (7), respectively;

(4) by inserting after "not be limited to the following:" (as amended by paragraph (1)) the following new paragraphs:

"(1)(A) Subject to subparagraphs (B) and (C), a certification by the Secretary that foreign plants in Canada and Mexico that export carcasses or meat or meat products referred to in subsection (a) have complied with paragraph (2) or with requirements that are equivalent to United States requirements with regard to all inspection and building construction standards, and all other provisions of this Act and regulations issued under this Act.

"(B) Subject to subparagraph (C), the Secretary may treat as equivalent to a United States requirement a requirement described in subparagraph (A) if the exporting country provides the Secretary with scientific evidence or other information, in accordance with risk assessment methodologies agreed to by the Secretary and the exporting country, to demonstrate that the requirement or standard of the exporting country achieves the level of protection that the Secretary considers appropriate.

"(C) The Secretary may—

"(i) determine, on a scientific basis, that a requirement of an exporting country does not achieve the level of protection that the Secretary considers appropriate; and

"(ii) provide the basis for the determination to the exporting country in writing on request.

"(2) A certification by the Secretary that, except as provided in paragraph (1), foreign plants that export carcasses or meat or meat products referred to in subsection (a) have complied with requirements that are at least equal to all inspection and building construction standards and all other provisions of this Act and regulations issued under this Act.";

(5) in paragraphs (3) through (7) (as redesignated by paragraph (3)), by striking "the" the first place it appears in each paragraph and inserting "The";

(6) in paragraphs (3) through (5) (as so redesignated), by striking the semicolon at the end of each paragraph and inserting a period; and

(7) in paragraph (6) (as so redesignated), by striking "; and" at the end and inserting a period.

(g) PEANUT BUTTER AND PEANUT PASTE.—

(1) IN GENERAL.—Except as provided in paragraph (2), all peanut butter and peanut paste in the United States domestic market shall be processed from peanuts that meet the quality standards established for peanuts under Marketing Agreement No. 146.

(2) IMPORTS.—Peanut butter and peanut paste imported into the United States shall comply with paragraph (1) or with sanitary measures that achieve at least the same level of sanitary protection.

(h) ANIMAL HEALTH BIOCONTAINMENT FACILITY.—

(1) GRANT FOR CONSTRUCTION.—The Secretary of Agriculture shall make a grant to a land grant college or university described in paragraph (2) for the construction of a facility at the college or university for the conduct of research in animal health, disease-transmitting insects, and toxic chemicals that requires the use of biocontainment facilities and equipment. The facility to be constructed with the grant shall be known as the "Southwest Regional Animal Health Biocontainment Facility".

(2) GRANT RECIPIENT DESCRIBED.—To be eligible for the grant under paragraph (1), a land grant college or university must be—

(A) located in a State adjacent to the international border with Mexico; and

(B) determined by the Secretary of Agriculture to have an established program in animal health research and education and to have a collaborative relationship with one or more colleges of veterinary medicine or universities located in Mexico.

(3) ACTIVITIES OF THE FACILITY.—The facility constructed using the grant made under paragraph (1) shall be used for conducting the following activities:

(A) The biocontainment facility shall offer the ability to organize multidisciplinary international teams working on basic and applied research on diagnostic method development and disease control strategies, including development of vaccines.

(B) The biocontainment facility shall support research that will improve the scientific basis for regulatory activities, decreasing the need for new regulatory programs and enhancing international trade.

(C) The biocontainment facility shall allow academic institutions, governmental agencies, and the private sector to conduct research in basic and applied research biology, epidemiology, pathogenesis, host response, and diagnostic methods, on disease agents that threaten the livestock industries of the United States and Mexico.

(D) The biocontainment facility may be used to support research involving food safety, toxicology, environmental pollutants, radioisotopes, recombinant microorganisms, and selected naturally resistant or transgenic animals.

(4) AUTHORIZATION OF APPROPRIATIONS.—There are authorized to be appropriated for each fiscal year such sums as are necessary to carry out this subsection.

(i) REPORTS ON INSPECTION OF IMPORTED MEAT, POULTRY, OTHER FOODS, ANIMALS, AND PLANTS.—

(1) DEFINITIONS.—As used in this subsection:

(A) IMPORTS.—The term "imports" means any meat, poultry, other food, animal, or plant that is imported into the United States in commercially significant quantities.

(B) SECRETARY.—The term "Secretary" means the Secretary of Agriculture.

(2) IN GENERAL.—In consultation with representatives of other appropriate agencies, the Secretary shall prepare an annual report on the impact of the Agreement on the inspection of imports.

(3) CONTENTS OF REPORTS.—The report required under this subsection shall, to the maximum extent practicable, include a description of—

(A) the quantity or, with respect to the Customs Service, the number of shipments, of imports from a NAFTA country that are inspected at the borders of the United States with Canada and Mexico during the prior year;

(B) any change in the level or types of inspections of imports in each NAFTA country during the prior year;

(C) in any case in which the Secretary has determined that the inspection system of another NAFTA country is equivalent to the inspection system of the United States, the reasons supporting the determination of the Secretary;

(D) the incidence of violations of inspection requirements by imports from NAFTA countries during the prior year—

(i) at the borders of the United States with Mexico or Canada; or

(ii) at the last point of inspection in a NAFTA country prior to shipment to the United States if the agency accepts inspection in that country;

(E) the incidence of violations of inspection requirements of imports to the United States from Mexico or Canada prior to the implementation of the Agreement;

(F) any additional cost associated with maintaining an adequate inspection system of imports as a result of the implementation of the Agreement;

(G) any incidence of transshipment of imports—

(i) that originate in a country other than a NAFTA country;

(ii) that are shipped to the United States through a NAFTA country during the prior year; and

(iii) that are incorrectly represented by the importer to qualify for preferential treatment under the Agreement;

(H) the quantity and results of any monitoring by the United States of equivalent inspection systems of imports in other NAFTA countries during the prior year;

(I) the use by other NAFTA countries of sanitary and phytosanitary measures (as defined in the Agreement) to limit exports of United States meat, poultry, other foods, animals, and plants to the countries during the prior year; and

(J) any other information the Secretary determines to be appropriate.

(4) FREQUENCY OF REPORTS.—The Secretary shall submit—

(A) the initial report required under this subsection not later than January 31, 1995; and

(B) an annual report required under this subsection not later than 1 year after the date of the submission of the initial report and the end of each 1-year period thereafter through calendar year 2004.

(5) REPORT TO CONGRESS.—The Secretary shall prepare and submit the report required under this subsection to the Committee on Agriculture of the House of Representatives and the Committee on Agriculture, Nutrition, and Forestry of the Senate.

Subtitle F—Corporate Average Fuel Economy

SEC. 371. CORPORATE AVERAGE FUEL ECONOMY.

(a) IN GENERAL.—Section 503(b)(2) of the Motor Vehicle Information and Cost Savings Act (15 U.S.C. 2003(b)(2)) is amended by adding at the end the following new subparagraph:

"(G)(i) In accordance with the schedule set out in clause (ii), an automobile shall be considered domestically manufactured in a model year if at least 75 percent of the cost to the manufacturer of the automobile is attributable to value added in the United States, Canada, or Mexico, unless the assembly of the automobile is completed in Canada or Mexico and the automobile is not imported into the United States prior to the expiration of 30 days following the end of that model year.

"(ii) Clause (i) shall apply to all automobiles manufactured by a manufacturer and sold in the United States, wherever assembled, in accordance with the following schedule:

"(I) With respect to a manufacturer that initiated the assembly of automobiles in Mexico before model year 1992, the manufacturer may elect, at any time between January 1, 1997, and January 1, 2004, to have clause (i) apply to all automobiles it manufactures, beginning with the model year commencing after the date of such election.

"(II) With respect to a manufacturer initiating the assembly of automobiles in Mexico after model year 1991, clause (i) shall apply to all automobiles it manufactures, beginning with the model year commencing after January 1, 1994, or the model year commencing after the date that the manufacturer initiates the assembly of automobiles in Mexico, whichever is later.

"(III) With respect to a manufacturer not described by subclause (I) or (II) assembling automobiles in the United States or Canada but not in Mexico, the manufacturer may elect, at any time between January 1, 1997, and January 1, 2004, to have clause (i) apply to all automobiles it manufactures, beginning with the model year commencing after the date of such election, except that if such manufacturer initiates the assembly of automobiles in Mexico before making such election, this subclause shall not apply and the manufacturer shall be subject to clause (II).

"(IV) With respect to a manufacturer not assembling automobiles in the United States, Canada, or Mexico, clause (i) shall apply to all automobiles it manufactures, beginning with the model year commencing after January 1, 1994.

"(V) With respect to a manufacturer authorized to make an election under subclause (I) or (III) which has not made that election within the specified period, clause (i) shall apply to all automobiles it manufactures, beginning with the model year commencing after January 1, 2004.

"(iii) The Secretary shall prescribe reasonable procedures for elections under this subparagraph, and the EPA Administrator may prescribe rules for purposes of carrying out this subparagraph.".

(b) CONFORMING AMENDMENTS.—The first sentence of section 503(b)(2)(E) of the Motor Vehicle Information and Cost Savings Act (15 U.S.C. 2003(b)(2)(E)) is amended—

(1) by striking "An" and inserting "Except as provided in subparagraph (G), an", and

(2) in the last sentence, by striking "this subparagraph" and inserting "this subparagraph and subparagraph (G)".

Subtitle G—Government Procurement

SEC. 381. GOVERNMENT PROCUREMENT.

(a) IN GENERAL.—Section 301 of the Trade Agreements Act of 1979 (19 U.S.C. 2511) is amended—

(1) in subsection (a) by striking "The President" and inserting "Subject to subsection (f) of this section, the President";

(2) by inserting "or the North American Free Trade Agreement" after "the Agreement" in paragraph (1) of subsection (b); and

(3) by adding at the end the following new subsections:

"(e) PROCUREMENT PROCEDURES BY CERTAIN FEDERAL AGENCIES.—Notwithstanding any other provision of law, the President may direct any agency of the United States listed in Annex 1001.1a–2 of the North American Free Trade Agreement to procure eligible products in compliance with the procedural provisions of chapter 10 of such Agreement.

"(f) SMALL BUSINESS AND MINORITY PREFERENCES.—The authority of the President under subsection (a) of this section to waive any law, regulation, procedure, or practice regarding Government procurement does not authorize the waiver of any small business or minority preference.".

(b) RECIPROCAL COMPETITIVE PROCUREMENT PRACTICES.—Section 302(a) of such Act (19 U.S.C. 2512(a)) is amended by striking "would otherwise be eligible products" in paragraph (1) and inserting "are products covered under the Agreement for procurement by the United States".

(c) DEFINITION OF ELIGIBLE PRODUCT.—Section 308(4)(A) of such Act (19 U.S.C. 2518(4)(A)) is amended to read as follows:

"(A) IN GENERAL.—The term 'eligible product' means, with respect to any foreign country or instrumentality that is—

"(i) a party to the Agreement, a product or service of that country or instrumentality which is covered under the Agreement for procurement by the United States; or

"(ii) a party to the North American Free Trade Agreement, a product or service of that country or instrumentality which is covered under the North American Free Trade Agreement for procurement by the United States.".

(d) CONFORMING AMENDMENTS.—Section 401 of the Rural Electrification Act of 1938 (7 U.S.C. 903 note) is amended by inserting ", Mexico, or Canada" after "the United States" each place it appears.

(e) EFFECTIVE DATE.—The provisions of this subtitle take effect on the date the Agreement enters into force with respect to the United States.

TITLE IV—DISPUTE SETTLEMENT IN ANTIDUMPING AND COUNTERVAILING DUTY CASES

Subtitle A—Organizational, Administrative, and Procedural Provisions Regarding the Implementation of Chapter 19 of the Agreement

SEC. 401. REFERENCES IN SUBTITLE.

Any reference in this subtitle to an Annex, chapter, or article shall be considered to be a reference to the respective Annex, chapter, or article of the Agreement.

SEC. 402. ORGANIZATIONAL AND ADMINISTRATIVE PROVISIONS.

(a) CRITERIA FOR SELECTION OF INDIVIDUALS TO SERVE ON PANELS AND COMMITTEES.—

(1) IN GENERAL.—The selection of individuals under this section for—

(A) placement on lists prepared by the interagency group under subsection (c)(2)(B) (i) and (ii);

(B) placement on preliminary candidate lists under subsection (c)(3)(A);

(C) placement on final candidate lists under subsection (c)(4)(A);

(D) placement by the Trade Representative on the rosters described in paragraph 1 of Annex 1901.2 and paragraph 1 of Annex 1904.13; and

(E) appointment by the Trade Representative for service on the panels and committees convened under chapter 19;

shall be made on the basis of the criteria provided in paragraph 1 of Annex 1901.2 and paragraph 1 of Annex 1904.13 and shall be made without regard to political affiliation.

(2) ADDITIONAL CRITERIA FOR ROSTER PLACEMENTS AND APPOINTMENTS UNDER PARAGRAPH 1 OF ANNEX 1901.2.—Rosters described in paragraph 1 of Annex 1901.2 shall include, to the fullest extent practicable, judges and former judges who meet the criteria referred to in paragraph (1). The Trade Representative shall, subject to subsection (b), appoint judges to binational panels convened under chapter 19, extraordinary challenge committees convened under chapter 19, and special committees established under article 1905, where such judges offer and are available to serve and such service is authorized by the chief judge of the court on which they sit.

(b) SELECTION OF CERTAIN JUDGES TO SERVE ON PANELS AND COMMITTEES.—

(1) APPLICABILITY.—This subsection applies only with respect to the selection of individuals for binational panels convened under chapter 19, extraordinary challenge committees convened under chapter 19, and special committees established under article 1905, who are judges of courts created under article III of the Constitution of the United States.

(2) CONSULTATION WITH CHIEF JUDGES.—The Trade Representative shall consult, from time to time, with the chief judges of the Federal judicial circuits regarding the interest in, and availability for, participation in binational panels, extraordinary challenge committees, and special committees, of judges within their respective circuits. If the chief judge of a Federal judicial circuit determines that it is appropriate for one or more judges within that circuit to be included on a roster described in subsection (a)(1)(D), the chief judge shall identify all such judges for the Chief Justice of the United States who may, upon his or her approval, submit the names of such judges to the Trade Representative. The Trade Representative shall include the names of such judges on the roster.

(3) SUBMISSION OF LISTS TO CONGRESS.—The Trade Representative shall submit to the Committee on the Judiciary and the Committee on Ways and Means of the House of Representatives and to the Committee on Finance and the Committee on the Judiciary of the Senate a list of all judges included on a roster under paragraph (2). Such list shall be submitted at the same time as the final candidate lists are submitted under subsection (c)(4)(A) and the final forms of amendments are submitted under subsection (c)(4)(C)(iv).

(4) APPOINTMENT OF JUDGES TO PANELS OR COMMITTEES.—At such time as the Trade Representative proposes to appoint a judge described in paragraph (1) to a binational panel, an extraordinary challenge committee, or a special committee, the Trade Representative shall consult with that judge in order to ascertain whether the judge is available for such appointment.

(c) SELECTION OF OTHER CANDIDATES.—

(1) APPLICABILITY.—This subsection applies only with respect to the selection of individuals for binational panels convened under chapter 19, extraordinary challenge committees convened under chapter 19, and special committees established under article 1905, other than those individuals to whom subsection (b) applies.

(2) INTERAGENCY GROUP.—

(A) ESTABLISHMENT.—There is established within the interagency organization established under section 242 of the Trade Expansion Act of 1962 (19 U.S.C. 1872) an interagency group which shall—

(i) be chaired by the Trade Representative; and

(ii) consist of such officers (or the designees thereof) of the United States Government as the Trade Representative considers appropriate.

(B) FUNCTIONS.—The interagency group established under subparagraph (A) shall, in a manner consistent with chapter 19—

(i) prepare by January 3 of each calendar year—

(I) a list of individuals who are qualified to serve as members of binational panels convened under chapter 19; and

(II) a list of individuals who are qualified to serve on extraordinary challenge committees convened under chapter 19 and special committees established under article 1905;

(ii) if the Trade Representative makes a request under paragraph (4)(C)(i) with respect to a final candidate list during any calendar year, prepare by July 1 of such calendar year a list of those individuals who are qualified to be added to that final candidate list;

(iii) exercise oversight of the administration of the United States Section that is authorized to be established under section 105; and

(iv) make recommendations to the Trade Representative regarding the convening of extraordinary challenge committees and special committees under chapter 19.

(3) PRELIMINARY CANDIDATE LISTS.—

(A) IN GENERAL.—The Trade Representative shall select individuals from the respective lists prepared by the interagency group under paragraph (2)(B)(i) for placement on—

(i) a preliminary candidate list of individuals eligible to serve as members of binational panels under Annex 1901.2; and

(ii) a preliminary candidate list of individuals eligible for selection as members of extraordinary challenge committees under Annex 1904.13 and special committees under article 1905.

(B) SUBMISSION OF LISTS TO CONGRESSIONAL COMMITTEES.—

(i) IN GENERAL.—No later than January 3 of each calendar year, the Trade Representative shall submit to the Committee on Finance of the Senate and the Committee on Ways and Means of the House of Representatives (hereafter in this section referred to as the "appropriate Congressional Committees") the preliminary candidate lists of those individuals selected by the Trade Representative under subparagraph (A) to be candidates eligible to serve on panels or committees convened pursuant to chapter 19 during the 1-year period beginning on April 1 of such calendar year.

(ii) ADDITIONAL INFORMATION.—At the time the candidate lists are submitted under clause (i), the Trade Representative shall submit for each individual on the list a statement of professional qualifications.

(C) CONSULTATION.—Upon submission of the preliminary candidate lists under subparagraph (B) to the appropriate Congressional Committees, the Trade Representative shall consult with such Committees with regard to the individuals included on the preliminary candidate lists.

(D) REVISION OF LISTS.—The Trade Representative may add and delete individuals from the preliminary candidate lists submitted under subparagraph (B) after consultation with the appropriate Congressional Committees regarding the additions and deletions. The Trade Representative shall provide to the appropriate Congressional Committees written notice of any addition or deletion of an individual from the preliminary candidate lists, along with the information described in subparagraph (B)(ii) with respect to any proposed addition.

(4) FINAL CANDIDATE LISTS.—

(A) SUBMISSION OF LISTS TO CONGRESSIONAL COMMITTEES.—No later than March 31 of each calendar year, the Trade Representative shall submit to the appropriate Congressional Committees the final candidate lists of those individuals selected by the Trade Representative to be candidates eligible to serve on panels and committees convened under chapter 19 during the 1-year period beginning on April 1 of such calendar year. An individual may be included on a final candidate list only if such individual was included in the preliminary candidate list or if written notice of the addition of such individual to the preliminary candidate list was submitted to the appropriate Congressional Committees at least 15 days before the date on which that final candidate list is submitted to such Committees under this subparagraph.

(B) FINALITY OF LISTS.—Except as provided in subparagraph (C), no additions may be made to the final candidate lists after the final candidate lists are submitted to the appropriate Congressional Committees under subparagraph (A).

(C) AMENDMENT OF LISTS.—

(i) IN GENERAL.—If, after the Trade Representative has submitted the final candidate lists to the appropriate Congressional Committees under subparagraph (A) for a calendar year and before July 1 of such calendar year, the Trade Representative determines that additional individuals need to be added to a final candidate list, the Trade Representative shall—

(I) request the interagency group established under paragraph (2)(A) to prepare a list of individuals who are qualified to be added to such candidate list;

(II) select individuals from the list prepared by the interagency group under paragraph (2)(B)(ii) to be included in a proposed amendment to such final candidate list; and

(III) by no later than July 1 of such calendar year, submit to the appropriate Congressional Committees the proposed amendments to such final candidate list developed by the Trade Representative under subclause (II), along with the information described in paragraph (3)(B)(ii).

(ii) CONSULTATION WITH CONGRESSIONAL COMMITTEES.—Upon submission of a proposed amendment under clause (i)(III) to the appropriate Congressional Committees, the Trade Representative shall consult with the appropriate Congressional Committees with regard to the individuals included in the proposed amendment.

(iii) ADJUSTMENT OF PROPOSED AMENDMENT.—The Trade Representative may add and delete individuals from any proposed amendment submitted under clause (i)(III) after consulting with the appropriate Congressional Committees with regard to the additions and deletions. The Trade Representative shall provide to the appropriate Congressional Committees written notice of any addition or deletion of an individual from the proposed amendment.

(iv) FINAL AMENDMENT.—

(I) IN GENERAL.—If the Trade Representative submits under clause (i)(III) in any calendar year a proposed amendment to a final candidate list, the Trade Representative shall, no later than September 30 of such calendar year, submit to the appropriate Congressional Committees the final form of such amendment. On October 1 of such calendar year, such amendment shall take effect and, subject to subclause (II), the individuals included in the final form of such amendment shall be added to the final candidate list.

(II) INCLUSION OF INDIVIDUALS.—An individual may be included in the final form of an amendment submitted under subclause (I) only if such individual was included in the proposed form of such amendment or if written notice of the addition of such individual to the proposed form of such amendment was submitted to the appropriate Congressional Committees at least 15 days before the date on which the final form of such amendment is submitted to such Committees under subclause (I).

(III) ELIGIBILITY FOR SERVICE.—Individuals added to a final candidate list under subclause (I) shall be eligible to serve on panels or committees convened under chapter 19 during the 6-month period beginning on October 1 of the calendar year in which such addition occurs.

(IV) FINALITY OF AMENDMENT.—No additions may be made to the final form of an amendment described in subclause (I) after the final form of such amendment is submitted to the appropriate Congressional Committees under subclause (I).

(5) TREATMENT OF RESPONSES.—For purposes of applying section 1001 of title 18, United States Code, the written or oral responses of individuals to inquiries of the interagency group established under paragraph (2)(A) or of the Trade Representative regarding their personal and professional qualifications, and financial and other relevant interests, that bear on their suitability for the placements and appointments described in subsection (a)(1), shall be treated as matters within the jurisdiction of an agency of the United States.

(d) SELECTION AND APPOINTMENT.—

(1) AUTHORITY OF TRADE REPRESENTATIVE.—The Trade Representative is the only officer of the United States Government authorized to act on behalf of the United States Government in making any selection or appointment of an individual to—

(A) the rosters described in paragraph 1 of Annex 1901.2 and paragraph 1 of Annex 1904.13; or

(B) the panels or committees convened under chapter 19;

that is to be made solely or jointly by the United States Government under the terms of the Agreement.

(2) RESTRICTIONS ON SELECTION AND APPOINTMENT.—Except as provided in paragraph (3)—

(A) the Trade Representative may—

(i) select an individual for placement on the rosters described in paragraph 1 of Annex 1901.2 and paragraph 1 of Annex 1904.13 during the 1-year period beginning on April 1 of any calendar year;

(ii) appoint an individual to serve as one of those members of any panel or committee convened under chapter 19 during such 1-year period who, under the terms of the Agreement, are to be appointed solely by the United States Government; or

(iii) act to make a joint appointment with the Government of a NAFTA country, under the terms of the Agreement, of any individual who is a citizen or national of the United States to serve as any other member of such a panel or committee;

only if such individual is on the appropriate final candidate list that was submitted to the appropriate Congressional Committees under subsection (c)(4)(A) during such calendar year or on such list as it may be amended under subsection (c)(4)(C)(iv)(I), or on the list submitted under subsection (b)(3) to the Congressional Committees referred to in such subsection; and

(B) no individual may—

(i) be selected by the United States Government for placement on the rosters described in paragraph 1 of Annex 1901.2 and paragraph 1 of Annex 1904.13; or

(ii) be appointed solely or jointly by the United States Government to serve as a member of a panel or committee convened under chapter 19;

during the 1-year period beginning on April 1 of any calendar year for which the Trade Representative has not met the requirements of subsection (a), and of subsection (b) or (c) (as the case may be).

(3) EXCEPTIONS.—Notwithstanding subsection (c)(3) (other than subparagraph (B)), (c)(4), or paragraph (2)(A) of this subsection, individuals included on the preliminary candidate lists submitted to the appropriate Congressional Committees under subsection (c)(3)(B) may—

(A) be selected by the Trade Representative for placement on the rosters described in paragraph 1 of Annex 1901.2 and paragraph 1 of Annex 1904.13 during the 3-month period beginning on the date on which the Agreement enters into force with respect to the United States; and

(B) be appointed solely or jointly by the Trade Representative under the terms of the Agreement to serve as members of panels or committees that are convened under chapter 19 during such 3-month period.

(e) TRANSITION.—If the Agreement enters into force between the United States and a NAFTA country after January 3, 1994, the provisions of subsection (c) shall be applied with respect to the calendar year in which such entering into force occurs—

(1) by substituting "the date that is 30 days after the date on which the Agreement enters into force with respect to the United States" for "January 3 of each calendar year" in subsections (c)(2)(B)(i) and (c)(3)(B)(i); and

(2) by substituting "the date that is 3 months after the date on which the Agreement enters into force with respect to the United States" for "March 31 of each calendar year" in subsection (c)(4)(A).

(f) IMMUNITY.—With the exception of acts described in section 777(f)(3) of the Tariff Act of 1930 (19 U.S.C. 1677f(f)(3)), individuals serving on panels or committees convened pursuant to chapter 19, and individuals designated to assist the individuals serving on such panels or committees, shall be immune from suit and legal process relating to acts performed by such individuals in their official capacity and within the scope of their functions as such panelists or committee members or assistants to such panelists or committee members.

(g) REGULATIONS.—The administering authority under title VII of the Tariff Act of 1930, the International Trade Commission, and the Trade Representative may promulgate such regulations as are necessary or appropriate to carry out actions in order to implement their respective responsibilities under chapter 19. Initial regulations to carry out such functions shall be issued before the date on which the Agreement enters into force with respect to the United States.

(h) REPORT TO CONGRESS.—At such time as the final candidate lists are submitted under subsection (c)(4)(A) and the final forms of amendments are submitted under subsection (c)(4)(C)(iv), the Trade Representative shall submit to the Committee on the Judiciary and the Committee on Ways and Means of the House of Representatives, and to the Committee on Finance and the Committee on the Judiciary of the Senate, a report regarding the efforts made to secure the participation of judges and former judges on binational panels, extraordinary challenge committees, and special committees established under chapter 19.

SEC. 403. TESTIMONY AND PRODUCTION OF PAPERS IN EXTRAORDINARY CHALLENGES.

(a) AUTHORITY OF EXTRAORDINARY CHALLENGE COMMITTEE TO OBTAIN INFORMATION.—If an extraordinary challenge committee (hereafter in this section referred to as the "committee") is convened under paragraph 13 of article 1904, and the allegations before the committee include a matter referred to in paragraph 13(a)(i) of article 1904, for the purposes of carrying out its functions and duties under Annex 1904.13, the committee—

(1) shall have access to, and the right to copy, any document, paper, or record pertinent to the subject matter under consideration, in the possession of any individual, partnership, corporation, association, organization, or other entity;

(2) may summon witnesses, take testimony, and administer oaths;

(3) may require any individual, partnership, corporation, association, organization, or other entity to produce documents, books, or records relating to the matter in question; and

(4) may require any individual, partnership, corporation, association, organization, or other entity to furnish in writing, in such detail and in such form as the committee may prescribe, information in its possession pertaining to the matter.

Any member of the committee may sign subpoenas, and members of the committee, when authorized by the committee, may administer oaths and affirmations, examine witnesses, take testimony, and receive evidence.

(b) WITNESSES AND EVIDENCE.—The attendance of witnesses who are authorized to be summoned, and the production of documentary evidence authorized to be ordered, under subsection (a) may be required from any place in the United States at any designated place of hearing. In the case of disobedience to a subpoena authorized under subsection (a), the committee may request the Attorney General of the United States to invoke the aid of any district or territorial court of the United States in requiring the attendance and testimony of witnesses and the production of documentary evidence. Such court, within the jurisdiction of which such inquiry is carried on, may, in case of contumacy or refusal to obey a subpoena issued to any individual, partnership, corporation, association, organization, or other entity, issue an order requiring such individual or entity to appear before the committee, or to produce documentary evidence if so ordered or to give evidence concerning the matter in question. Any failure to obey such order of the court may be punished by such court as a contempt thereof.

(c) MANDAMUS.—Any court referred to in subsection (b) shall have jurisdiction to issue writs of mandamus commanding compliance with the provisions of this section or any order of the committee made in pursuance thereof.

(d) DEPOSITIONS.—The committee may order testimony to be taken by deposition at any stage of the committee review. Such deposition may be taken before any person designated by the committee and having power to administer oaths. Such testimony shall be reduced to writing by the person taking the deposition, or under the direction of such person, and shall then be subscribed by the deponent. Any individual, partnership, corporation, association, organization, or other entity may be compelled to appear and be deposed and to produce documentary evidence in the same manner as witnesses may be compelled to appear and testify and produce documentary evidence before the committee, as provided in this section.

SEC. 404. REQUESTS FOR REVIEW OF DETERMINATIONS BY COMPETENT INVESTIGATING AUTHORITIES OF NAFTA COUNTRIES.

(a) DEFINITIONS.—As used in this section:

(1) COMPETENT INVESTIGATING AUTHORITY.—The term "competent investigating authority" means the competent investigating authority, as defined in article 1911, of a NAFTA country.

(2) UNITED STATES SECRETARY.—The term "United States Secretary" means that officer of the United States referred to in article 1908.

(b) REQUESTS FOR REVIEW BY THE UNITED STATES.—In the case of a final determination of a competent investigating authority, requests by the United States for binational panel review of such determination under article 1904 shall be made by the United States Secretary.

(c) REQUESTS FOR REVIEW BY A PERSON.—In the case of a final determination of a competent investigating authority, a person, within the meaning of paragraph 5 of article 1904, may request a binational panel review of such determination by filing such a request with the United States Secretary within the time limit provided for in paragraph 4 of article 1904. The receipt of such request by the United States Secretary shall be deemed to be a request for binational panel review within the meaning of article 1904. The request for such panel review shall be without prejudice to any challenge before a binational panel of the basis for a particular request for review.

(d) SERVICE OF REQUEST FOR REVIEW.—Whenever binational panel review of a final determination made by a competent investigating authority is requested under this section, the United States Secretary shall serve a copy of the request on all persons who would otherwise be entitled under the law of the importing country to commence proceedings for judicial review of the determination.

SEC. 405. RULES OF PROCEDURE FOR PANELS AND COMMITTEES.

(a) RULES OF PROCEDURE FOR BINATIONAL PANELS.—The administering authority shall prescribe rules, negotiated in accordance with paragraph 14 of article 1904, governing, with respect to binational panel reviews—

(1) requests for such reviews, complaints, other pleadings, and other papers;

(2) the amendment, filing, and service of such pleadings and papers;

(3) the joinder, suspension, and termination of such reviews; and

(4) other appropriate procedural matters.

(b) RULES OF PROCEDURE FOR EXTRAORDINARY CHALLENGE COMMITTEES.—The administering authority shall prescribe rules, negotiated in accordance with paragraph 2 of Annex 1904.13, governing the procedures for reviews by extraordinary challenge committees.

(c) RULES OF PROCEDURE FOR SAFEGUARDING THE PANEL REVIEW SYSTEM.—The administering authority shall prescribe rules, negotiated in accordance with Annex 1905.6, governing the procedures for special committees described in such Annex.

(d) PUBLICATION OF RULES.—The rules prescribed under subsections (a), (b), and (c) shall be published in the Federal Register.

(e) ADMINISTERING AUTHORITY.—As used in this section, the term "administering authority" has the meaning given such term in section 771(1) of the Tariff Act of 1930 (19 U.S.C. 1677(1)).

SEC. 406. SUBSIDY NEGOTIATIONS.

In the case of any trade agreement which may be entered into by the President with a NAFTA country, the negotiating objectives of the United States with respect to subsidies shall include—

(1) achievement of increased discipline on domestic subsidies provided by a foreign government, including—

(A) the provision of capital, loans, or loan guarantees on terms inconsistent with commercial considerations;

(B) the provision of goods or services at preferential rates;

(C) the granting of funds or forgiveness of debt to cover operating losses sustained by a specific industry; and

(D) the assumption of any costs or expenses of manufacture, production, or distribution;

(2) achievement of increased discipline on export subsidies provided by a foreign government, particularly with respect to agricultural products; and

(3) maintenance of effective remedies against subsidized imports, including, where appropriate, countervailing duties.

SEC. 407. IDENTIFICATION OF INDUSTRIES FACING SUBSIDIZED IMPORTS.

(a) PETITIONS.—Any entity, including a trade association, firm, certified or recognized union, or group of workers, that is representative of a United States industry and has reason to believe—

(1) that—

(A) as a result of implementation of provisions of the Agreement, the industry is likely to face increased competition from subsidized imports, from a NAFTA country, with which it directly competes; or

(B) the industry is likely to face increased competition from subsidized imports with which it directly competes from any other country designated by the President, following consultations with the Congress, as benefiting from a reduction of tariffs or other trade barriers under a trade agreement that enters into force with respect to the United States after January 1, 1994; and

(2) that the industry is likely to experience a deterioration of its competitive position before more effective rules and disciplines relating to the use of government subsidies have been developed with respect to the country concerned;

may file with the Trade Representative a petition that such industry be identified under this section.

(b) IDENTIFICATION OF INDUSTRY.—Within 90 days after receipt of a petition under subsection (a), the Trade Representative, in consultation with the Secretary of Commerce, shall decide whether to identify the industry on the basis that there is a reasonable likelihood that the industry may face both the subsidization described in subsection (a)(1) and the deterioration described in subsection (a)(2).

(c) ACTION AFTER IDENTIFICATION.—At the request of an entity that is representative of an industry identified under subsection (b), the Trade Representative shall—

(1) compile and make available to the industry information under section 308 of the Trade Act of 1974;

(2) recommend to the President that an investigation by the International Trade Commission be requested under section 332 of the Tariff Act of 1930; or

(3) take actions described in both paragraphs (1) and (2).

The industry may request the Trade Representative to take appropriate action to update (as often as annually) any information obtained under paragraph (1) or (2), or both, as the case may be, until an agreement on more effective rules and disciplines relating to government subsidies is reached between the United States and the NAFTA countries.

(d) INITIATION OF ACTION UNDER OTHER LAW.—

(1) IN GENERAL.—The Trade Representative and the Secretary of Commerce shall review information obtained under subsection (c) and consult with the industry identified under subsection (b) with a view to deciding whether any action is appropriate—

(A) under section 301 of the Trade Act of 1974, including the initiation of an investigation under section 302(c) of that Act (in the case of the Trade Representative); or

(B) under subtitle A of title VII of the Tariff Act of 1930, including the initiation of an investigation under section 702(a) of that Act (in the case of the Secretary of Commerce).

(2) CRITERIA FOR INITIATION.—In determining whether to initiate any investigation under section 301 of the Trade Act of 1974 or any other trade law, other than title VII of the Tariff Act of 1930, the Trade Representative, after consultation with the Secretary of Commerce—

(A) shall seek the advice of the advisory committees established under section 135 of the Trade Act of 1974;

(B) shall consult with the Committee on Finance of the Senate and the Committee on Ways and Means of the House of Representatives;

(C) shall coordinate with the interagency organization established under section 242 of the Trade Expansion Act of 1962; and

(D) may ask the President to request advice from the International Trade Commission.

(3) TITLE III ACTIONS.—In the event an investigation is initiated under section 302(c) of the Trade Act of 1974 as a result of a review under this subsection and the Trade Representative, following such investigation (including any applicable dispute settlement proceedings under the Agreement or any other trade agreement), determines to take action under section 301(a) of such Act, the Trade Representative shall give preference to actions that most directly affect the products that benefit from governmental subsidies and were the subject of the investigation, unless there are no significant imports of such products or the Trade Representative otherwise determines that application of the action to other products would be more effective.

(e) EFFECT OF DECISIONS.—Any decision, whether positive or negative, or any action by the Trade Representative or the Secretary of Commerce under this section shall not in any way—

(1) prejudice the right of any industry to file a petition under any trade law;

(2) prejudice, affect, or substitute for, any proceeding, investigation, determination, or action by the Secretary of Commerce, the International Trade Commission, or the Trade Representative pursuant to such a petition, or

(3) prejudice, affect, substitute for, or obviate any proceeding, investigation, or determination under section 301 of the Trade Act of 1974, title VII of the Tariff Act of 1930, or any other trade law.

(f) STANDING.—Nothing in this section may be construed to alter in any manner the requirements in effect before the date of the enactment of this Act for standing under any law of the United States or to add any additional requirements for standing under any law of the United States.

SEC. 408. TREATMENT OF AMENDMENTS TO ANTIDUMPING AND COUNTERVAILING DUTY LAW.

Any amendment enacted after the Agreement enters into force with respect to the United States that is made to—

(1) section 303 or title VII of the Tariff Act of 1930, or any successor statute, or

(2) any other statute which—

(A) provides for judicial review of final determinations under such section, title, or successor statute, or

(B) indicates the standard of review to be applied,

shall apply to goods from a NAFTA country only to the extent specified in the amendment.

Subtitle B—Conforming Amendments and Provisions

SEC. 411. JUDICIAL REVIEW IN ANTIDUMPING DUTY AND COUNTERVAILING DUTY CASES.

Section 516A of the Tariff Act of 1930 (19 U.S.C. 1516a) is amended as follows:

(1) Subsection (a)(5) (relating to time limits for commencing review) is amended to read as follows:

"(5) TIME LIMITS IN CASES INVOLVING MERCHANDISE FROM FREE TRADE AREA COUNTRIES.—Notwithstanding any other provision of this subsection, in the case of a determination to which the provisions of subsection (g) apply, an action under this subsection may not be commenced, and the time limits for commencing an action under this subsection shall not begin to run, until the day specified in whichever of the following subparagraphs applies:

"(A) For a determination described in paragraph (1)(B) or clause (i), (ii) or (iii) of paragraph (2)(B), the 31st day after the date on which notice of the determination is published in the Federal Register.

"(B) For a determination described in clause (vi) of paragraph (2)(B), the 31st day after the date on which the government of the relevant FTA country receives notice of the determination.

"(C) For a determination with respect to which binational panel review has commenced in accordance with subsection (g)(8), the day after the date as of which—

"(i) the binational panel has dismissed binational panel review of the determination for lack of jurisdiction, and

"(ii) any interested party seeking review of the determination under paragraph (1), (2), or (3) of this subsection has provided timely notice under subsection (g)(3)(B).

If such an interested party files a summons and complaint under this subsection after dismissal by the binational panel, and if a request for an extraordinary challenge committee is made with respect to the decision by the binational panel to dismiss—

"(I) judicial review under this subsection shall be stayed during consideration by the committee of the request, and

"(II) the United States Court of International Trade shall dismiss the action if the committee vacates or remands the binational panel decision to dismiss.

"(D) For a determination for which review by the United States Court of International Trade is provided for—

"(i) under subsection (g)(12)(B), the day after the date of publication in the Federal Register of notice that article 1904 of the NAFTA has been suspended, or

"(ii) under subsection (g)(12)(D), the day after the date that notice of settlement is published in the Federal Register.".

(2) Subsection (b)(3) (relating to the standards of review) is amended—

(A) by inserting "NAFTA OR" after "DECISIONS BY" in the heading; and

(B) by inserting "of the NAFTA or" after "article 1904".

(3) Subsection (f) (relating to definitions) is amended—

(A) by amending paragraphs (6) and (7) to read as follows:

"(6) UNITED STATES SECRETARY.—The term 'United States Secretary' means—

"(A) the secretary for the United States Section referred to in article 1908 of the NAFTA, and

"(B) the secretary of the United States Section provided for in article 1909 of the Agreement.

"(7) RELEVANT FTA SECRETARY.—The term 'relevant FTA Secretary' means the Secretary—

"(A) referred to in article 1908 of the NAFTA, or

"(B) provided for in paragraph 5 of article 1909 of the Agreement,

of the relevant FTA country."; and

(B) by adding at the end the following new paragraphs:

"(8) NAFTA.—The term 'NAFTA' means the North American Free Trade Agreement.

"(9) RELEVANT FTA COUNTRY.—The term 'relevant FTA country' means the free trade area country to which an antidumping or countervailing duty proceeding pertains.

"(10) FREE TRADE AREA COUNTRY.—The term 'free trade area country' means the following:

"(A) Canada for such time as the NAFTA is in force with respect to, and the United States applies the NAFTA to, Canada.

"(B) Mexico for such time as the NAFTA is in force with respect to, and the United States applies the NAFTA to, Mexico.

"(C) Canada for such time as—

"(i) it is not a free trade area country under subparagraph (A); and

"(ii) the Agreement is in force with respect to, and the United States applies the Agreement to, Canada.".

(4) Subsection (g) (relating to review of countervailing and antidumping duty determinations) is amended as follows:

(A) The subsection heading is amended by striking out "CANADIAN MERCHANDISE" and inserting "FREE TRADE AREA COUNTRY MERCHANDISE".

(B) Paragraph (1) is amended by striking out "Canadian merchandise" and inserting "free trade area country merchandise".

(C) Paragraph (2) is amended by inserting "of the NAFTA or" after "article 1904".

(D) Paragraph (3)(A) is amended—

(i) by striking out "nor Canada" and inserting "nor the relevant FTA country" in each of clauses (i) and (ii);

(ii) by inserting "of the NAFTA or" before "of the Agreement" in each of clauses (i) and (iii);

(iii) by striking out "or" at the end of clause (iii);

(iv) by amending clause (iv)—

(I) by striking out "under paragraph (2)(A)"; and

(II) by striking out the period and inserting a comma; and

(v) by adding at the end of subparagraph (A) the following:

"(v) a determination as to which binational panel review has terminated pursuant to paragraph 12 of article 1905 of the NAFTA, or "(vi) a determination as to which extraordinary challenge committee review has terminated pursuant to paragraph 12 of article 1905 of the NAFTA.".

(E) The first and second sentences of paragraph (3)(B) are amended to read as follows: "A determination described in subparagraph (A)(i) or (iv) is reviewable under subsection (a) only if the party seeking to commence review has provided timely notice of its intent to commence such review to—

"(i) the United States Secretary and the relevant FTA Secretary;

"(ii) all interested parties who were parties to the proceeding in connection with which the matter arises; and

"(iii) the administering authority or the Commission, as appropriate.

Such notice is timely provided if the notice is delivered no later than the date that is 20 days after the date described in subparagraph (A) or (B) of subsection (a)(5) that is applicable to such determination, except that, if the time for requesting binational panel review is suspended under paragraph (8)(A)(ii) of this subsection, any unexpired time for providing notice of intent to commence judicial review shall, during the pendency of any such suspension, also be suspended.".

(F) Paragraph (4)(A) is amended—

(i) in the first sentence—

(I) by inserting "the North American Free Trade Agreement Implementation Act implementing the binational dispute settlement system under chapter 19 of the NAFTA, or" after "or amendment made by,";

(II) by inserting a comma before "violates";

(III) by inserting "only" after "may be brought"; and

(IV) by inserting ", which shall have jurisdiction of such action" after "Circuit"; and

(ii) by striking the last sentence.

(G) Paragraph (5) is amended—

(i) by inserting "of the NAFTA or" after "article 1904" in each of subparagraphs (A), (B), and (C)(i);

(ii) by striking out ", the Canadian Secretary," in subparagraph (C)(ii) and inserting ", the relevant FTA Secretary,"; and

(iii) by inserting "of the NAFTA or" after "chapter 19" in subparagraph (C)(iii).

(H) Paragraph (6) is amended by inserting "of the NAFTA or" after "article 1904".

(I) Paragraph (7) is amended—

(i) by inserting "OF THE NAFTA OR THE AGREEMENT" before the period in the paragraph heading;

(ii) by striking out "IN GENERAL.—" in the heading to subparagraph (A) and inserting "ACTION UPON REMAND.—"; and

(iii) by inserting "the NAFTA or" before "the Agreement" in subparagraph (A).

(J) Paragraph (8)(A) is amended—

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(i) by inserting "(i) GENERAL RULE.—" before "An interested party";

(ii) by inserting "of the NAFTA or" after "article 1904(4)";

(iii) by indenting the text so as to align it with new clause (ii) (as added by clause (iv) of this subparagraph); and

(iv) by adding at the end the following new clause:

"(ii) SUSPENSION OF TIME TO REQUEST BINATIONAL PANEL REVIEW UNDER THE NAFTA.—Notwithstanding clause (i), the time for requesting binational panel review shall be suspended during the pendency of any stay of binational panel review that is issued pursuant to paragraph 11(a) of article 1905 of the NAFTA.".

(K) Paragraph (8)(B)(ii) is amended by striking out "Canadian Secretary," and inserting "relevant FTA Secretary,".

(L) Paragraph (8)(C) is amended by striking out "under article 1904 of the Agreement of a determination" and inserting "of a determination under article 1904 of the NAFTA or the Agreement".

(M) Paragraph (9) is amended by inserting "of the NAFTA or" after "chapter 19".

(N) Paragraph (10) is amended by striking out "Government of Canada" and all that follows thereafter and inserting "Government of the relevant FTA country received notice of the determination under paragraph 4 of article 1904 of the NAFTA or the Agreement.".

(O) The following new paragraphs are added at the end:

"(11) SUSPENSION AND TERMINATION OF SUSPENSION OF ARTICLE 1904 OF THE NAFTA.—

"(A) SUSPENSION OF ARTICLE 1904.—If a special committee established under article 1905 of the NAFTA issues an affirmative finding, the Trade Representative may, in accordance with paragraph 8(a) or 9, as appropriate, of article 1905 of the NAFTA, suspend the operation of article 1904 of the NAFTA.

"(B) TERMINATION OF SUSPENSION OF ARTICLE 1904.—If a special committee is reconvened and makes an affirmative determination described in paragraph 10(b) of article 1905 of the NAFTA, any suspension of the operation of article 1904 of the NAFTA shall terminate.

"(12) JUDICIAL REVIEW UPON TERMINATION OF BINATIONAL PANEL OR COMMITTEE REVIEW UNDER THE NAFTA.—

"(A) NOTICE OF SUSPENSION OR TERMINATION OF SUSPENSION OF ARTICLE 1904.—

"(i) Upon notification by the Trade Representative or the Government of a country described in subsection (f)(10) (A) or (B) that the operation of article 1904 of the NAFTA has been suspended in accordance with paragraph 8(a) or 9 of article 1905 of the NAFTA, the United States Secretary shall publish in the Federal Register a notice of suspension of article 1904 of the NAFTA.

"(ii) Upon notification by the Trade Representative or the Government of a country described in subsection (f)(10) (A) or (B) that the suspension of the operation of article 1904 of the NAFTA is terminated in accordance with paragraph 10 of article 1905 of the NAFTA, the United States Secretary shall publish in the Federal Register a notice of termination of suspension of article 1904 of the NAFTA.

"(B) TRANSFER OF FINAL DETERMINATIONS FOR JUDICIAL REVIEW UPON SUSPENSION OF ARTICLE 1904.—If the operation of article 1904 of the NAFTA is suspended in accordance with paragraph 8(a) or 9 of article 1905 of the NAFTA—

"(i) upon the request of an authorized person described in subparagraph (C), any final determination that is the subject of a binational panel review or an extraordinary challenge committee review shall be transferred to the United States Court of International Trade (in accordance with rules issued by the Court) for review under subsection (a); or

"(ii) in a case in which—

"(I) a binational panel review was completed fewer than 30 days before the suspension, and

"(II) extraordinary challenge committee review has not been requested,

upon the request of an authorized person described in subparagraph (C) which is made within 60 days after the completion of the binational panel review, the final determination that was the subject of the binational panel review shall be transferred to the United States Court of International Trade (in accordance with rules issued by the Court) for review under subsection (a).

"(C) PERSONS AUTHORIZED TO REQUEST TRANSFER OF FINAL DETERMINATIONS FOR JUDICIAL REVIEW.—A request that a final determination be transferred to the Court of International Trade under subparagraph (B) may be made by—

"(i) if the United States made an allegation under paragraph 1 of article 1905 of the NAFTA and the operation of article 1904 of the NAFTA was suspended pursuant to paragraph 8(a) of article 1905 of the NAFTA—

"(I) the government of the relevant country described in subsection (f)(10) (A) or (B),

"(II) an interested party that was a party to the panel or committee review, or

"(III) an interested party that was a party to the proceeding in connection with which panel review was requested, but only if the time period for filing notices of appearance in the panel review has not expired, or

"(ii) if a country described in subsection (f)(10) (A) or (B) made an allegation under paragraph 1 of article 1905 of the NAFTA and the operation of article 1904 of the NAFTA was suspended pursuant to paragraph 9 of article 1905 of the NAFTA—

"(I) the government of that country,

"(II) an interested party that is a person of that country and that was a party to the panel or committee review, or

"(III) an interested party that is a person of that country and that was a party to the proceeding in connection with which panel review was requested, but only if the time period for filing notices of appearance in the panel review has not expired.

"(D)(i) TRANSFER FOR JUDICIAL REVIEW UPON SETTLEMENT.—If the Trade Representative achieves a settlement with the government of a country described in subsection (f)(10) (A) or (B) pursuant to paragraph 7 of article 1905 of the NAFTA, and referral for judicial review is among the terms of such settlement, any final determination that is the subject of a binational panel review or an extraordinary challenge committee review shall, upon a request described in clause (ii), be transferred to the United States Court of International Trade (in accordance with rules issued by the Court) for review under subsection (a).

"(ii) A request referred to in clause (i) is a request made by—

"(I) the country referred to in clause (i),

"(II) an interested party that was a party to the panel or committee review, or

"(III) an interested party that was a party to the proceeding in connection with which panel review was requested, but only if the time for filing notices of appearance in the panel review has not expired.".

SEC. 412. CONFORMING AMENDMENTS TO OTHER PROVISIONS OF THE TARIFF ACT OF 1930.

(a) REGULATIONS FOR APPRAISEMENT AND CLASSIFICATION; FINALITY AND DECISION.—Sections 502(b) and 514(b) of the Tariff Act of 1930 (19 U.S.C. 1502(b) and 1514(b)) are each amended by inserting "the North American Free Trade Agreement or" before "the United States-Canada Free-Trade Agreement".

(b) DEFINITION.—Section 771 of the Tariff Act of 1930 (19 U.S.C. 1677) is amended—

(1) by redesignating as paragraph (21) (and placing in numerical sequence) the second paragraph that is designated as paragraph (18) (relating to the definition of the United States-Canada Agreement) in such section; and

(2) by inserting after paragraph (21) (as redesignated by paragraph (1) of this subsection) the following new paragraph:

"(22) NAFTA.—The term 'NAFTA' means the North American Free Trade Agreement.".

(c) DISCLOSURE OF PROPRIETARY INFORMATION IN TITLE VII PROCEEDINGS.—Section 777(f) of the Tariff Act of 1930 (19 U.S.C. 1677f(f)) is amended—

(1) by inserting "THE NORTH AMERICAN FREE TRADE AGREEMENT OR" before "THE UNITED STATES-CANADA AGREEMENT" in the heading;

(2) by inserting "the NAFTA or" before "the United States-Canada Agreement" each place it appears in paragraph (1)(A);

(3) in the second sentence of paragraph (1)(A)—

(A) by inserting "or extraordinary challenge committee" after "binational panel"; and

(B) by inserting "or committee" after "the panel";

(4) in paragraph (1)(B)—

(A) by inserting "the NAFTA or" before "the Agreement" in clauses (iii) and (iv); and

(B) by striking out "Government of Canada designated by an authorized agency of Canada" in clause (iv) and inserting "Government of a free trade area country (as defined in section 516A(f)(10)) designated by an authorized agency of such country";

(5) in paragraph (2) by inserting ", including any extraordinary challenge," after "binational panel proceeding";

(6) in paragraph (3)—

(A) by inserting "or extraordinary challenge committee" after "binational panel", and

(B) by inserting "the NAFTA or" before "the United States-Canada Agreement";

(7) by striking out "agency of Canada" in each of paragraphs (3) and (4) and inserting "agency of a free trade area country (as defined in section 516A(f)(10))"; and

(8) in the first sentence of paragraph (4) by inserting ", except a judge appointed to a binational panel or an extraordinary challenge committee under section 402(b) of the North American Free Trade Agreement Implementation Act," after "Any person".

SEC. 413. CONSEQUENTIAL AMENDMENT TO FREE-TRADE AGREEMENT ACT OF 1988.

Section 410(a) of the United States-Canada Free-Trade Agreement Implementation Act of 1988 (19 U.S.C. 2112 note) is amended by adding at the end the following new sentence: "In calculating the 7-year period referred to in paragraph (1), any time during which Canada is a NAFTA country (as defined in section 2(4) of the North American Free Trade Agreement Implementation Act) shall be disregarded.".

SEC. 414. CONFORMING AMENDMENTS TO TITLE 28, UNITED STATES CODE.

(a) COURT OF INTERNATIONAL TRADE.—Chapter 95 of title 28, United States Code, is amended—

(1) in section 1581(i) by inserting "the North American Free Trade Agreement or" before "the United States-Canada Free-Trade Agreement";

(2) in section 1584—

(A) by amending the section heading to read as follows:

"§ 1584. Civil actions under the North American Free Trade Agreement or the United States-Canada Free-Trade Agreement"; and

(B) by striking out "777(d)" and inserting "777(f)"; and

(3) in the table of contents for such chapter by amending the entry for section 1584 to read as follows:

"1584. Civil actions under the North American Free Trade Agreement or the United States-Canada Free-Trade Agreement.".

(b) PARTICULAR PROCEEDINGS.—Sections 2201(a) and 2643(c)(5) of title 28, United States Code, are each amended by striking out "Canadian merchandise," and inserting "merchandise of a free trade area country (as defined in section 516A(f)(10) of the Tariff Act of 1930),".

SEC. 415. EFFECT OF TERMINATION OF NAFTA COUNTRY STATUS.

(a) IN GENERAL.—Except as provided in subsection (b), on the date on which a country ceases to be a NAFTA country, the provisions of this title (other than this section) and the amendments made by this title shall cease to have effect with respect to that country.

(b) TRANSITION PROVISIONS.—

(1) PROCEEDINGS REGARDING PROTECTIVE ORDERS AND UNDERTAKINGS.—If on the date on which a country ceases to be a NAFTA country an investigation or enforcement proceeding concerning the violation of a protective order issued under section 777(f) of the Tariff Act of 1930 (as amended by this subtitle) or an undertaking of the Government of that country is pending, the investigation or proceeding shall continue, and sanctions may continue to be imposed, in accordance with the provisions of such section 777(f).

(2) BINATIONAL PANEL AND EXTRAORDINARY CHALLENGE COMMITTEE REVIEWS.—If on the date on which a country ceases to be a NAFTA country—

(A) a binational panel review under article 1904 of the Agreement is pending, or has been requested; or

(B) an extraordinary challenge committee review under article 1904 of the Agreement is pending, or has been requested;

with respect to a determination which involves a class or kind of merchandise and to which section 516A(g)(2) of the Tariff Act of 1930 applies, such determination shall be reviewable under section 516A(a) of the Tariff Act of 1930. In the case of a determination to which the provisions of this paragraph apply, the time limits for commencing an action under 516A(a) of the Tariff Act of 1930 shall not begin to run until the date on which the Agreement ceases to be in force with respect to that country.

SEC. 416. EFFECTIVE DATE.

The provisions of this title and the amendments made by this title take effect on the date the Agreement enters into force with respect to the United States, but shall not apply—

(1) to any final determination described in paragraph (1)(B), or (2)(B) (i), (ii), or (iii), of section 516A(a) of the Tariff Act of 1930 notice of which is published in the Federal Register before such date, or to a determination described in paragraph (2)(B)(vi) of section 516A(a) of such Act notice of which is received by the Government of Canada or Mexico before such date; or

(2) to any binational panel review under the United States-Canada Free-Trade Agreement, or any extraordinary challenge arising out of any such review, that was commenced before such date.

TITLE V—NAFTA TRANSITIONAL ADJUSTMENT ASSISTANCE AND OTHER PROVISIONS

Subtitle A—NAFTA Transitional Adjustment Assistance Program

SEC. 501. SHORT TITLE.

This subtitle may be cited as the "NAFTA Worker Security Act".

SEC. 502. ESTABLISHMENT OF NAFTA TRANSITIONAL ADJUSTMENT ASSISTANCE PROGRAM.

Chapter 2 of title II of the Trade Act of 1974 (19 U.S.C. 2271 et seq.) is amended by adding at the end the following new subchapter:

"Subchapter D—NAFTA Transitional Adjustment Assistance Program

"SEC. 250. ESTABLISHMENT OF TRANSITIONAL PROGRAM.

"(a) GROUP ELIGIBILITY REQUIREMENTS.—

"(1) CRITERIA.—A group of workers (including workers in any agricultural firm or subdivision of an agricultural firm) shall be certified as eligible to apply for adjustment assistance under this subchapter pursuant to a petition filed under subsection (b) if the Secretary determines that a significant number or proportion of the workers in such workers' firm or an appropriate subdivision of the firm have become totally or partially separated, or are threatened to become totally or partially separated, and either—

"(A) that—

"(i) the sales or production, or both, of such firm or subdivision have decreased absolutely,

"(ii) imports from Mexico or Canada of articles like or directly competitive with articles produced by such firm or subdivision have increased, and

"(iii) the increase in imports under clause (ii) contributed importantly to such workers' separation or threat of separation and to the decline in the sales or production of such firm or subdivision; or

"(B) that there has been a shift in production by such workers' firm or subdivision to Mexico or Canada of articles like or directly competitive with articles which are produced by the firm or subdivision.

"(2) DEFINITION OF CONTRIBUTED IMPORTANTLY.—The term 'contributed importantly', as used in paragraph (1)(A)(iii), means a cause which is important but not necessarily more important than any other cause.

"(3) REGULATIONS.—The Secretary shall issue regulations relating to the application of the criteria described in paragraph (1) in making preliminary findings under subsection (b) and determinations under subsection (c).

"(b) PRELIMINARY FINDINGS AND BASIC ASSISTANCE.—

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"(1) FILING OF PETITIONS.—A petition for certification of eligibility to apply for adjustment assistance under this subchapter may be filed by a group of workers (including workers in any agricultural firm or subdivision of an agricultural firm) or by their certified or recognized union or other duly authorized representative with the Governor of the State in which such workers' firm or subdivision thereof is located.

"(2) FINDINGS AND ASSISTANCE.—Upon receipt of a petition under paragraph (1), the Governor shall—

"(A) notify the Secretary that the Governor has received the petition;

"(B) within 10 days after receiving the petition—

"(i) make a preliminary finding as to whether the petition meets the criteria described in subsection (a)(1) (and for purposes of this clause the criteria described under subparagraph (A)(iii) of such subsection shall be disregarded), and

"(ii) transmit the petition, together with a statement of the finding under clause (i) and reasons therefor, to the Secretary for action under subsection (c); and

"(C) if the preliminary finding under subparagraph (B)(i) is affirmative, ensure that rapid response and basic readjustment services authorized under other Federal law are made available to the workers.

"(c) REVIEW OF PETITIONS BY SECRETARY; CERTIFICATIONS.—

"(1) IN GENERAL.—The Secretary, within 30 days after receiving a petition under subsection (b), shall determine whether the petition meets the criteria described in subsection (a)(1). Upon a determination that the petition meets such criteria, the Secretary shall issue to workers covered by the petition a certification of eligibility to apply for assistance described in subsection (d).

"(2) DENIAL OF CERTIFICATION.—Upon denial of certification with respect to a petition under paragraph (1), the Secretary shall review the petition in accordance with the requirements of subchapter A to determine if the workers may be certified under such subchapter.

"(d) COMPREHENSIVE ASSISTANCE.—Workers covered by certification issued by the Secretary under subsection (c) shall be provided, in the same manner and to the same extent as workers covered under a certification under subchapter A, the following:

"(1) Employment services described in section 235.

"(2) Training described in section 236, except that notwithstanding the provisions of section 236(a)(2)(A), the total amount of payments for training under this subchapter for any fiscal year shall not exceed $30,000,000.

"(3) Trade readjustment allowances described in sections 231 through 234, except that—

"(A) the provisions of sections 231(a)(5)(C) and 231(c), authorizing the payment of trade readjustment allowances upon a finding that it is not feasible or appropriate to approve a training program for a worker, shall not be applicable to payment of such allowances under this subchapter; and

"(B) notwithstanding the provisions of section 233(b), in order for a worker to qualify for trade readjustment allowances under this subchapter, the worker shall be enrolled in a training program approved by the Secretary under section 236(a) by the later of—

"(i) the last day of the 16th week of such worker's initial unemployment compensation benefit period, or

"(ii) the last day of the 6th week after the week in which the Secretary issues a certification covering such worker.

In cases of extenuating circumstances relating to enrollment in a training program, the Secretary may extend the time for enrollment for a period not to exceed 30 days.

"(4) Job search allowances described in section 237.

"(5) Relocation allowances described in section 238.

"(e) ADMINISTRATION.—The provisions of subchapter C shall apply to the administration of the program under this subchapter in the same manner and to the same extent as such provisions apply to the administration of the program under subchapters A and B, except that the agreement between the Secretary and the States described in section 239 shall specify the procedures that will be used to carry out the certification process under subsection (c) and the procedures for providing relevant data by the Secretary to assist the States in making preliminary findings under subsection (b).".

SEC. 503. CONFORMING AMENDMENTS.

(a) REFERENCES.—Sections 221(a), 222(a), and 223(a) of the Trade Act of 1974 (19 U.S.C. 2271(a), 2272(a), and 2273(a)) are each amended by striking out "assistance under this chapter" and inserting "assistance under this subchapter".

(b) BENEFIT INFORMATION.—Section 225(b) of the Trade Act of 1974 (19 U.S.C. 2275(b)) is amended by inserting "or subchapter D" after "subchapter A" each place it appears.

(c) NONDUPLICATION OF ASSISTANCE.—Subchapter C of chapter 2 of title II of the Trade Act of 1974 is amended by adding at the end the following new section:

"SEC. 249A. NONDUPLICATION OF ASSISTANCE.

"No worker may receive assistance relating to a separation pursuant to certifications under both subchapters A and D of this chapter.".

(d) JUDICIAL REVIEW.—Section 284(a) of the Trade Act of 1974 (19 U.S.C. 2395(a)) is amended by inserting "or section 250(c)" after "section 223".

(e) TABLE OF CONTENTS.—The table of contents for chapter 2 of title II of the Trade Act of 1974 is amended—

(1) by inserting after the item relating to section 249 the following new item:

"Sec. 249A. Nonduplication of assistance.";

and

(2) by adding at the end thereof the following new items:

"SUBCHAPTER D—NAFTA TRANSITIONAL ADJUSTMENT ASSISTANCE PROGRAM

"Sec. 250. Establishment of transitional program.".

SEC. 504. AUTHORIZATION OF APPROPRIATIONS.

Section 245 of the Trade Act of 1974 (19 U.S.C. 2317) is amended—

(1) by striking "There" and inserting "(a) IN GENERAL.—There",

(2) by inserting ", other than subchapter D" after "chapter", and

(3) by adding at the end the following new subsection:

"(b) SUBCHAPTER D.—There are authorized to be appropriated to the Department of Labor, for each of fiscal years 1994, 1995, 1996, 1997, and 1998, such sums as may be necessary to carry out the purposes of subchapter D of this chapter.".

SEC. 505. TERMINATION OF TRANSITION PROGRAM.

Subsection (c) of section 285 of the Trade Act of 1974 (19 U.S.C. 2271 preceding note) is amended—

(1) by striking "No" and inserting "(1) Except as provided in paragraph (2), no"; and

(2) by adding at the end the following new paragraph:

"(2)(A) Except as provided in subparagraph (B), no assistance, vouchers, allowances, or other payments may be provided under subchapter D of chapter 2 after the day that is the earlier of—

"(i) September 30, 1998, or

"(ii) the date on which legislation, establishing a program providing dislocated workers with comprehensive assistance substantially similar to the assistance provided by such subchapter D, becomes effective.

"(B) Notwithstanding subparagraph (A), if, on or before the day described in subparagraph (A), a worker—

"(i) is certified as eligible to apply for assistance, under subchapter D of chapter 2; and

"(ii) is otherwise eligible to receive assistance in accordance with section 250,

such worker shall continue to be eligible to receive such assistance for any week for which the worker meets the eligibility requirements of such section.".

SEC. 506. EFFECTIVE DATE.

(a) IN GENERAL.—The amendments made by sections 501, 502, 503, 504, and 505 shall take effect on the date the Agreement enters into force with respect to the United States.

(b) COVERED WORKERS.—

(1) GENERAL RULE.—Except as provided in paragraph (2), no worker shall be certified as eligible to receive assistance under subchapter D of chapter 2 of title II of the Trade Act of 1974 (as added by this subtitle) whose last total or partial separation from a firm (or appropriate subdivision of a firm) occurred before such date of entry into force.

(2) REACHBACK.—Notwithstanding paragraph (1), any worker—

(A) whose last total or partial separation from a firm (or appropriate subdivision of a firm) occurs—

(i) after the date of the enactment of this Act, and

(ii) before such date of entry into force, and

(B) who would otherwise be eligible to receive assistance under subchapter D of chapter 2 of title II of the Trade Act of 1974,

shall be eligible to receive such assistance in the same manner as if such separation occurred on or after such date of entry into force.

SEC. 507. TREATMENT OF SELF-EMPLOYMENT ASSISTANCE PROGRAMS.

(a) GENERAL RULE.—Section 3306 of the Internal Revenue Code of 1986 is amended by adding at the end the following new subsection:

"(t) SELF-EMPLOYMENT ASSISTANCE PROGRAM.—For the purposes of this chapter, the term 'self-employment assistance program' means a program under which—

"(1) individuals who meet the requirements described in paragraph (3) are eligible to receive an allowance in lieu of regular unemployment compensation under the State law for the purpose of assisting such individuals in establishing a business and becoming self-employed;

"(2) the allowance payable to individuals pursuant to paragraph (1) is payable in the same amount, at the same interval, on the same terms, and subject to the same conditions, as regular unemployment compensation under the State law, except that—

"(A) State requirements relating to availability for work, active search for work, and refusal to accept work are not applicable to such individuals;

"(B) State requirements relating to disqualifying income are not applicable to income earned from self-employment by such individuals; and

"(C) such individuals are considered to be unemployed for the purposes of Federal and State laws applicable to unemployment compensation,

as long as such individuals meet the requirements applicable under this subsection;

"(3) individuals may receive the allowance described in paragraph (1) if such individuals—

"(A) are eligible to receive regular unemployment compensation under the State law, or would be eligible to receive such compensation except for the requirements described in subparagraph (A) or (B) of paragraph (2);

"(B) are identified pursuant to a State worker profiling system as individuals likely to exhaust regular unemployment compensation; and

"(C) are participating in self-employment assistance activities which—

"(i) include entrepreneurial training, business counseling, and technical assistance; and

"(ii) are approved by the State agency; and

"(D) are actively engaged on a full-time basis in activities (which may include training) relating to the establishment of a business and becoming self-employed;

"(4) the aggregate number of individuals receiving the allowance under the program does not at any time exceed 5 percent of the number of individuals receiving regular unemployment compensation under the State law at such time;

"(5) the program does not result in any cost to the Unemployment Trust Fund (established by section 904(a) of the Social Security Act) in excess of the cost that would be incurred by such State and charged to such Fund if the State had not participated in such program; and

"(6) the program meets such other requirements as the Secretary of Labor determines to be appropriate.".

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(b) CONFORMING AMENDMENTS.—

(1) Section 3304(a)(4) of such Code is amended—

(A) in subparagraph (D), by striking "; and" and inserting a semicolon;

(B) in subparagraph (E), by striking the semicolon and inserting "; and"; and

(C) by adding at the end the following new subparagraph:

"(F) amounts may be withdrawn for the payment of allowances under a self-employment assistance program (as defined in section 3306(t));".

(2) Section 3306(f) of such Code is amended—

(A) in paragraph (3), by striking "; and" and inserting a semicolon;

(B) in paragraph (4), by striking the period and inserting "; and"; and

(C) by adding at the end the following new paragraph:

"(5) amounts may be withdrawn for the payment of allowances under a self-employment assistance program (as defined in subsection (t)).".

(3) Section 303(a)(5) of the Social Security Act (42 U.S.C. 503(a)(5)) is amended by striking "; and" and inserting ": *Provided further*, That amounts may be withdrawn for the payment of allowances under a self-employment assistance program (as defined in section 3306(t) of the Internal Revenue Code of 1986); and".

(c) STATE REPORTS.—Any State operating a self-employment program authorized by the Secretary of Labor under this section shall report annually to the Secretary on the number of individuals who participate in the self-employment assistance program, the number of individuals who are able to develop and sustain businesses, the operating costs of the program, compliance with program requirements, and any other relevant aspects of program operations requested by the Secretary.

(d) REPORT TO CONGRESS.—Not later than 4 years after the date of the enactment of this Act, the Secretary of Labor shall submit a report to the Congress with respect to the operation of the program authorized under this section. Such report shall be based on the reports received from the States pursuant to subsection (c) and include such other information as the Secretary of Labor determines is appropriate.

(e) EFFECTIVE DATE; SUNSET.—

(1) EFFECTIVE DATE.—The provisions of this section and the amendments made by this section shall take effect on the date of the enactment of this Act.

(2) SUNSET.—The authority provided by this section, and the amendments made by this section, shall terminate 5 years after the date of the enactment of this Act.

Subtitle B—Provisions Relating to Performance Under the Agreement

SEC. 511. DISCRIMINATORY TAXES.

It is the sense of the Congress that when a State, province, or other governmental entity of a NAFTA country discriminatorily enforces sales or other taxes so as to afford protection to domestic production or domestic service providers, such enforcement is in violation of the terms of the Agreement. When such discriminatory enforcement adversely affects United States producers of goods or United States service providers, the Trade Representative should pursue all appropriate remedies to obtain removal of such discriminatory enforcement, including invocation of the provisions of the Agreement.

SEC. 512. REVIEW OF THE OPERATION AND EFFECTS OF THE AGREEMENT.

(a) STUDY.—By not later than July 1, 1997, the President shall provide to the Congress a comprehensive study on the operation and effects of the Agreement. The study shall include an assessment of the following factors:

(1) The net effect of the Agreement on the economy of the United States, including with respect to the United States gross national product, employment, balance of trade, and current account balance.

(2) The industries (including agricultural industries) in the United States that have significantly increased exports to Mexico or Canada as a result of the Agreement, or in which imports into the United States from Mexico or Canada have increased significantly as a result of the Agreement, and the extent of any change in the wages, employment, or productivity in each such industry as a result of the Agreement.

(3) The extent to which investment in new or existing production or other operations in the United States has been redirected to Mexico as a result of the Agreement, and the effect on United States employment of such redirection.

(4) The extent of any increase in investment, including foreign direct investment and increased investment by United States investors, in new or existing production or other operations in the United States as a result of the Agreement, and the effect on United States employment of such investment.

(5) The extent to which the Agreement has contributed to—

(A) improvement in real wages and working conditions in Mexico,

(B) effective enforcement of labor and environmental laws in Mexico, and

(C) the reduction or abatement of pollution in the region of the United States-Mexico border.

(b) SCOPE.—In assessing the factors listed in subsection (a), to the extent possible, the study shall distinguish between the consequences of the Agreement and events that likely would have occurred without the Agreement. In addition, the study shall evaluate the effects of the Agreement relative to aggregate economic changes and, to the extent possible, relative to the effects of other factors, including—

(1) international competition,

(2) reductions in defense spending,

(3) the shift from traditional manufacturing to knowledge and information based economic activity, and

(4) the Federal debt burden.

(c) RECOMMENDATIONS OF THE PRESIDENT.—The study shall include any appropriate recommendations by the President with respect to the operation and effects of the Agreement, including recommendations with respect to the specific factors listed in subsection (a).

(d) RECOMMENDATIONS OF CERTAIN COMMITTEES.—The President shall provide the study to the Committee on Ways and Means of the House of Representatives and the Committee on Finance of the Senate and any other committee that has jurisdiction over any provision of United States law that was either enacted or amended by the North American Free Trade Agreement Implementation Act. Each such committee may hold hearings and make recommendations to the President with respect to the operation and effects of the Agreement.

SEC. 513. ACTIONS AFFECTING UNITED STATES CULTURAL INDUSTRIES.

Section 182 of the Trade Act of 1974 (19 U.S.C. 2242) is amended by adding at the end the following new subsection:

"(f) SPECIAL RULE FOR ACTIONS AFFECTING UNITED STATES CULTURAL INDUSTRIES.—

"(1) IN GENERAL.—By no later than the date that is 30 days after the date on which the annual report is submitted to Congressional committees under section 181(b), the Trade Representative shall identify any act, policy, or practice of Canada which—

"(A) affects cultural industries,

"(B) is adopted or expanded after December 17, 1992, and

"(C) is actionable under article 2106 of the North American Free Trade Agreement.

"(2) SPECIAL RULES FOR IDENTIFICATIONS.—For purposes of section 302(b)(2)(A), an act, policy, or practice identified under this subsection shall be treated as an act, policy, or practice that is the basis for identification of a country under subsection (a)(2), unless the United States has already taken action pursuant to article 2106 of the North American Free Trade Agreement in response to such act, policy, or practice. In deciding whether to identify an act, policy, or practice under paragraph (1), the Trade Representative shall—

"(A) consult with and take into account the views of representatives of the relevant domestic industries, appropriate committees established pursuant to section 135, and appropriate officers of the Federal Government, and

"(B) take into account the information from such sources as may be available to the Trade Representative and such information as may be submitted to the Trade Representative by interested persons, including information contained in reports submitted under section 181(b).

"(3) CULTURAL INDUSTRIES.—For purposes of this subsection, the term 'cultural industries' means persons engaged in any of the following activities:

"(A) The publication, distribution, or sale of books, magazines, periodicals, or newspapers in print or machine readable form but not including the sole activity of printing or typesetting any of the foregoing.

"(B) The production, distribution, sale, or exhibition of film or video recordings.

"(C) The production, distribution, sale, or exhibition of audio or video music recordings.

"(D) The publication, distribution, or sale of music in print or machine readable form.

"(E) Radio communications in which the transmissions are intended for direct reception by the general public, and all radio, television, and cable broadcasting undertakings and all satellite programming and broadcast network services.".

SEC. 514. REPORT ON IMPACT OF NAFTA ON MOTOR VEHICLE EXPORTS TO MEXICO.

(a) FINDINGS.—The Congress makes the following findings:

(1) Trade in motor vehicles and motor vehicle parts is one of the most restricted areas of trade between the United States and Mexico.

(2) The elimination of Mexico's restrictive barriers to trade in motor vehicles and motor vehicle parts over a 10-year period under the Agreement should increase substantially United States exports of such products to Mexico.

(3) The Department of Commerce estimates that the Agreement provides the opportunity to increase United States exports of motor vehicles and motor vehicle parts by $1,000,000,000 during the first year of the Agreement's implementation with the potential for additional increases over the 10-year transition period.

(4) The United States automotive industry has estimated that United States exports of motor vehicles to Mexico should increase to more than 60,000 units during the first year of the Agreement's implementation, which is substantially above the current level of 4,000 units.

(b) TRADE REPRESENTATIVE REPORT.—No later than July 1, 1995, and annually thereafter through 1999, the Trade Representative shall submit a report to the Committee on Finance of the Senate and the Committee on Ways and Means of the House of Representatives on how effective the provisions of the Agreement are with respect to increasing United States exports of motor vehicles and motor vehicle parts to Mexico. Each report shall identify and determine the following:

(1) The patterns of trade in motor vehicles and motor vehicle parts between the United States and Mexico during the preceding 12-month period.

(2) The level of tariff and nontariff barriers that were in force during the preceding 12-month period.

(3) The amount by which United States exports of motor vehicles and motor vehicle parts to Mexico have increased from the preceding 12-month period as a result of the elimination of Mexican tariff and nontariff barriers under the Agreement.

(4) Whether any such increase in United States exports meets the levels of new export opportunities anticipated under the Agreement.

(5) If the anticipated levels of new United States export opportunities are not reached, what actions the Trade Representative is prepared to take to realize the benefits anticipated under the Agreement, including possible initiation of additional negotiations with Mexico for the purpose of seeking modifications of the Agreement.

SEC. 515. CENTER FOR THE STUDY OF WESTERN HEMISPHERIC TRADE.

(a) AMENDMENT TO THE CBI.—The Caribbean Basin Economic Recovery Act (19 U.S.C. 2701 et seq.) is amended by inserting after section 218 the following new section:

"SEC. 219. CENTER FOR THE STUDY OF WESTERN HEMISPHERIC TRADE.

"(a) ESTABLISHMENT.—The Commissioner of Customs, after consultation with appropriate officials in the State of Texas, is authorized and directed to make grants to an institution (or a consortium of such institutions) to assist such institution in planning, establishing, and operating a Center for the Study of Western Hemispheric Trade (hereafter in this section referred to as the 'Center'). The Commissioner of Customs shall make the first grant not later than December 1, 1994, and the Center shall be established not later than February 1, 1995.

"(b) SCOPE OF THE CENTER.—The Center shall be a year-round program operated by an institution located in the State of Texas (or a consortium of such institutions), the purpose of which is to promote and study trade between and among Western Hemisphere countries. The Center shall conduct activities designed to examine—

"(1) the impact of the NAFTA on the economies in, and trade within, the Western Hemisphere,

"(2) the negotiation of any future free trade agreements, including possible accessions to the NAFTA; and

"(3) adjusting tariffs, reducing nontariff barriers, improving relations among customs officials, and promoting economic relations among countries in the Western Hemisphere.

"(c) CONSULTATION; SELECTION CRITERIA.—The Commissioner of Customs shall consult with appropriate officials of the State of Texas and private sector authorities with respect to selecting, planning, and establishing the Center. In selecting the appropriate institution, the Commissioner of Customs shall give consideration to—

"(1) the institution's ability to carry out the programs and activities described in this section; and

"(2) any resources the institution can provide the Center in addition to Federal funds provided under this program.

"(d) PROGRAMS AND ACTIVITIES.—The Center shall conduct the following activities:

"(1) Provide forums for international discussion and debate for representatives from countries in the Western Hemisphere regarding issues which affect trade and other economic relations within the hemisphere, including the impact of the NAFTA on individual economies and the desirability and feasibility of possible accessions to the NAFTA by such countries.

"(2) Conduct studies and research projects on subjects which affect Western Hemisphere trade, including tariffs, customs, regional and national economics, business development and finance, production and personnel management, manufacturing, agriculture, engineering, transportation, immigration, telecommunications, medicine, science, urban studies, border demographics, social anthropology, and population.

"(3) Publish materials, disseminate information, and conduct seminars and conferences to support and educate representatives from countries in the Western Hemisphere who seek to do business with or invest in other Western Hemisphere countries.

"(4) Provide grants, fellowships, endowed chairs, and financial assistance to outstanding scholars and authorities from Western Hemisphere countries.

"(5) Provide grants, fellowships, and other financial assistance to qualified graduate students, from Western Hemisphere countries, to study at the Center.

"(6) Implement academic exchange programs and other cooperative research and instructional agreements with the complementary North/South Center at the University of Miami at Coral Gables.

"(e) DEFINITIONS.—For purposes of this section—

"(1) NAFTA.—The term 'NAFTA' means the North American Free Trade Agreement.

"(2) WESTERN HEMISPHERE COUNTRIES.—The terms 'Western Hemisphere countries', 'countries in the Western Hemisphere', and 'Western Hemisphere' mean Canada, the United States, Mexico, countries located in South America, beneficiary countries (as defined by section 212), the Commonwealth of Puerto Rico, and the United States Virgin Islands.

"(f) FEES FOR SEMINARS AND PUBLICATIONS.—Notwithstanding any other provision of law, a grant made under this section may provide that the Center may charge a reasonable fee for attendance at seminars and conferences and for copies of publications, studies, reports, and other documents the Center publishes. The Center may waive such fees in any case in which it determines imposing a fee would impose a financial hardship and the purposes of the Center would be served by granting such a waiver.

"(g) DURATION OF GRANT.—The Commissioner of Customs is directed to make grants to any institution or institutions selected as the Center for fiscal years 1994, 1995, 1996, and 1997.

"(h) REPORT.—The Commissioner of Customs shall, no later than July 1, 1994, and annually thereafter for years for which grants are made, submit a written report to the Committee on Finance of the Senate and the Committee on Ways and Means of the House of Representatives. The first report shall include—

"(1) a statement identifying the institution or institutions selected as the Center,

"(2) the reasons for selecting the institution or institutions as the Center, and

"(3) the plan of such institution or institutions for operating the Center.

Each subsequent report shall include information with respect to the operations of the Center, the collaboration of the Center with, and dissemination of information to, Government policymakers and the business community with respect to the study of Western Hemispheric trade by the Center, and the plan and efforts of the Center to continue operations after grants under this section have expired.".

(b) AUTHORIZATION OF APPROPRIATIONS.—There are authorized to be appropriated $10,000,000 for fiscal year 1994, and such sums as may be necessary in the 3 succeeding fiscal years to carry out the purposes of section 219 of the Caribbean Basin Economic Recovery Act (as added by subsection (a)).

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SEC. 516. EFFECTIVE DATE.

(a) IN GENERAL.—Except as provided in subsection (b), the provisions of this subtitle shall take effect on the date the Agreement enters into force with respect to the United States.

(b) EXCEPTION.—Section 515 shall take effect on the date of the enactment of this Act.

Subtitle C—Funding

PART 1—CUSTOMS USER FEES

SEC. 521. FEES FOR CERTAIN CUSTOMS SERVICES.

(a) IN GENERAL.—Section 13031 of the Consolidated Omnibus Budget Reconciliation Act of 1985 (19 U.S.C. 58c) is amended—

(1) by amending paragraph (5) of subsection (a) to read as follows:

"(5)(A) For fiscal years 1994, 1995, 1996, and 1997, for the arrival of each passenger aboard a commercial vessel or commercial aircraft from outside the customs territory of the United States, $6.50.

"(B) For fiscal year 1998 and each fiscal year thereafter, for the arrival of each passenger aboard a commercial vessel or commercial aircraft from a place outside the United States (other than a place referred to in subsection (b)(1)(A) of this section), $5."

(2) by adding at the end of paragraph (1) of subsection (b), the following flush sentence:

"Subparagraph (A) shall not apply to fiscal years 1994, 1995, 1996, and 1997.",

(3) in subsection (f)—

(A) in paragraph (1), by striking "except" and all that follows through the end period and inserting: "except—

"(A) the portion of such fees that is required under paragraph (3) for the direct reimbursement of appropriations, and

"(B) the portion of such fees that is determined by the Secretary to be excess fees under paragraph (5).",

(B) in paragraph (3)(A), by striking the first parenthetical and inserting "(other than the fees under subsection (a) (9) and (10) and the excess fees determined by the Secretary under paragraph (5))",

(C) in paragraph (4), by striking "under subsection (a)" and inserting "under subsection (a) (other than the excess fees determined by the Secretary under paragraph (5))", and

(D) by adding at the end thereof the following new paragraph:

"(5) At the close of each of fiscal years 1994, 1995, 1996, and 1997, the Secretary of the Treasury shall determine the amount of the fees collected under paragraph (5)(A) of subsection (a) for that fiscal year that exceeds the amount of such fees that would have been collected for such fiscal year if the fees that were in effect on the day before the effective date of this paragraph applied to such fiscal year. The amount of the excess fees determined under the preceding sentence shall be deposited in the Customs User Fee Account and shall be available for reimbursement of inspectional costs (including passenger processing costs) not otherwise reimbursed under this section, and shall be available only to the extent provided in appropriations Acts.", and

(4) in paragraph (3) of subsection (j), by striking "September 30, 1998" and inserting "September 30, 2003".

(b) EFFECTIVE DATE.—The amendments made by this section shall take effect on the date the Agreement enters into force with respect to the United States.

PART 2—INTERNAL REVENUE CODE AMENDMENTS

SEC. 522. AUTHORITY TO DISCLOSE CERTAIN TAX INFORMATION TO THE UNITED STATES CUSTOMS SERVICE.

(a) IN GENERAL.—Subsection (l) of section 6103 of the Internal Revenue Code of 1986 (relating to confidentiality and disclosure of returns and return information) is amended by adding at the end thereof the following new paragraph:

"(14) DISCLOSURE OF RETURN INFORMATION TO UNITED STATES CUSTOMS SERVICE.—The Secretary may, upon written request from the Commissioner of the United States Customs Service, disclose to officers and employees of the Department of the Treasury such return information with respect to taxes imposed by chapters 1 and 6 as the Secretary may prescribe by regulations, solely for the purpose of, and only to the extent necessary in—

"(A) ascertaining the correctness of any entry in audits as provided for in section 509 of the Tariff Act of 1930 (19 U.S.C. 1509), or

"(B) other actions to recover any loss of revenue, or to collect duties, taxes, and fees, determined to be due and owing pursuant to such audits."

(b) CONFORMING AMENDMENTS.—Paragraphs (3)(A) and (4) of section 6103(p) of such Code are each amended by striking "or (13)" each place it appears and inserting "(13), or (14)".

(c) EFFECTIVE DATE.—

(1) IN GENERAL.—The amendments made by this section shall take effect on the date the Agreement enters into force with respect to the United States.

(2) REGULATIONS.—Not later than 90 days after the date of the enactment of this Act, the Secretary of the Treasury or his delegate shall issue temporary regulations to carry out section 6103(l)(14) of the Internal Revenue Code of 1986, as added by this section.

SEC. 523. USE OF ELECTRONIC FUND TRANSFER SYSTEM FOR COLLECTION OF CERTAIN TAXES.

(a) GENERAL RULE.—Section 6302 of the Internal Revenue Code of 1986 (relating to mode or time of collection) is amended by redesignating subsection (h) as subsection (i) and by inserting after subsection (g) the following new subsection:

"(h) USE OF ELECTRONIC FUND TRANSFER SYSTEM FOR COLLECTION OF CERTAIN TAXES.—

"(1) ESTABLISHMENT OF SYSTEM.—

"(A) IN GENERAL.—The Secretary shall prescribe such regulations as may be necessary for the development and implementation of an electronic fund transfer system which is required to be used for the collection of depository taxes. Such system shall be designed in such manner as may be necessary to ensure that such taxes are credited to the general account of the Treasury on the date on which such taxes would otherwise have been required to be deposited under the Federal tax deposit system.

"(B) EXEMPTIONS.—The regulations prescribed under subparagraph (A) may contain such exemptions as the Secretary may deem appropriate.

"(2) PHASE-IN REQUIREMENTS.—

"(A) IN GENERAL.—Except as provided in subparagraph (B), the regulations referred to in paragraph (1)—

"(i) shall contain appropriate procedures to assure that an orderly conversion from the Federal tax deposit system to the electronic fund transfer system is accomplished, and

"(ii) may provide for a phase-in of such electronic fund transfer system by classes of taxpayers based on the aggregate undeposited taxes of such taxpayers at the close of specified periods and any other factors the Secretary may deem appropriate.

"(B) PHASE-IN REQUIREMENTS.—The phase-in of the electronic fund transfer system shall be designed in such manner as may be necessary to ensure that—

"(i) during each fiscal year beginning after September 30, 1993, at least the applicable required percentage of the total depository taxes imposed by chapters 21, 22, and 24 shall be collected by means of electronic fund transfer, and

"(ii) during each fiscal year beginning after September 30, 1993, at least the applicable required percentage of the total other depository taxes shall be collected by means of electronic fund transfer.

"(C) APPLICABLE REQUIRED PERCENTAGE.—

"(i) In the case of the depository taxes imposed by chapters 21, 22, and 24, the applicable required percentage is—

"(I) 3 percent for fiscal year 1994,

"(II) 16.9 percent for fiscal year 1995,

"(III) 20.1 percent for fiscal year 1996,

"(IV) 58.3 percent for fiscal years 1997 and 1998, and

"(V) 94 percent for fiscal year 1999 and all fiscal years thereafter.

"(ii) In the case of other depository taxes, the applicable required percentage is—

"(I) 3 percent for fiscal year 1994,

"(II) 20 percent for fiscal year 1995,

"(III) 30 percent for fiscal year 1996,

"(IV) 60 percent for fiscal years 1997 and 1998, and

"(V) 94 percent for fiscal year 1999 and all fiscal years thereafter.

"(3) DEFINITIONS.—For purposes of this subsection—

"(A) DEPOSITORY TAX.—The term 'depository tax' means any tax if the Secretary is authorized to require deposits of such tax.

"(B) ELECTRONIC FUND TRANSFER.—The term 'electronic fund transfer' means any transfer of funds, other than a transaction originated by check, draft, or similar paper instrument, which is initiated through an electronic terminal, telephonic instrument, or computer or magnetic tape so as to order, instruct, or authorize a financial institution or other financial intermediary to debit or credit an account.

"(4) COORDINATION WITH OTHER ELECTRONIC FUND TRANSFER REQUIREMENTS.—

"(A) COORDINATION WITH CERTAIN EXCISE TAXES.—In determining whether the requirements of subparagraph (B) of paragraph (2) are met, taxes required to be paid by electronic fund transfer under sections 5061(e) and 5703(b) shall be disregarded.

"(B) ADDITIONAL REQUIREMENT.—Under regulations, any tax required to be paid by electronic fund transfer under section 5061(e) or 5703(b) shall be paid in such a manner as to ensure that the requirements of the second sentence of paragraph (1)(A) of this subsection are satisfied.".

(b) EFFECTIVE DATE.—

(1) IN GENERAL.—The amendments made by this section shall take effect on the date the Agreement enters into force with respect to the United States.

(2) REGULATIONS.—Not later than 210 days after the date of enactment of this Act, the Secretary of the Treasury or his delegate shall prescribe temporary regulations under section 6302(h) of the Internal Revenue Code of 1986 (as added by this section).

Subtitle D—Implementation of NAFTA Supplemental Agreements

PART 1—AGREEMENTS RELATING TO LABOR AND ENVIRONMENT

SEC. 531. AGREEMENT ON LABOR COOPERATION.

(a) COMMISSION FOR LABOR COOPERATION.—

(1) MEMBERSHIP.—The United States is authorized to participate in the Commission for Labor Cooperation in accordance with the North American Agreement on Labor Cooperation.

(2) CONTRIBUTIONS TO BUDGET.—There are authorized to be appropriated to the President (or such agency as the President may designate) $2,000,000 for each of fiscal years 1994 and 1995 for United States contributions to the annual budget of the Commission for Labor Cooperation pursuant to Article 47 of the North American Agreement on Labor Cooperation. Funds authorized to be appropriated for such contributions by this paragraph are in addition to any funds otherwise available for such contributions. Funds authorized to be appropriated

by this paragraph are authorized to be made available until expended.

(b) DEFINITIONS.—As used in this section—

(1) the term "Commission for Labor Cooperation" means the commission established by Part Three of the North American Agreement on Labor Cooperation; and

(2) the term "North American Agreement on Labor Cooperation" means the North American Agreement on Labor Cooperation Between the Government of the United States of America, the Government of Canada, and the Government of the United Mexican States (signed at Mexico City, Washington, and Ottawa on September 8, 9, 12, and 14, 1993).

SEC. 532. AGREEMENT ON ENVIRONMENTAL COOPERATION.

(a) COMMISSION FOR ENVIRONMENTAL COOPERATION.—

(1) MEMBERSHIP.—The United States is authorized to participate in the Commission for Environmental Cooperation in accordance with the North American Agreement on Environmental Cooperation.

(2) CONTRIBUTIONS TO BUDGET.—There are authorized to be appropriated to the President (or such agency as the President may designate) $5,000,000 for each of fiscal years 1994 and 1995 for United States contributions to the annual budget of the Commission for Environmental Cooperation pursuant to Article 43 of the North American Agreement on Environmental Cooperation. Funds authorized to be appropriated for such contributions by this paragraph are in addition to any funds otherwise available for such contributions. Funds authorized to be appropriated by this paragraph are authorized to be made available until expended.

(b) DEFINITIONS.—As used in this section—

(1) the term "Commission for Environmental Cooperation" means the commission established by Part Three of the North American Agreement on Environmental Cooperation; and

(2) the term "North American Agreement on Environmental Cooperation" means the North American Agreement on Environmental Cooperation Between the Government of the United States of America, the Government of Canada, and the Government of the United Mexican States (signed at Mexico City, Washington, and Ottawa on September 8, 9, 12, and 14, 1993).

SEC. 533. AGREEMENT ON BORDER ENVIRONMENT COOPERATION COMMISSION.

(a) BORDER ENVIRONMENT COOPERATION COMMISSION.—

(1) MEMBERSHIP.—The United States is authorized to participate in the Border Environment Cooperation Commission in accordance with the Border Environment Cooperation Agreement.

(2) CONTRIBUTIONS TO THE COMMISSION BUDGET.—There are authorized to be appropriated to the President (or such agency as the President may designate) $5,000,000 for fiscal year 1994 and each fiscal year thereafter for United States contributions to the budget of the Border Environment Cooperation Commission pursuant to section 7 of Article III of Chapter I of the Border Environment Cooperation Agreement. Funds authorized to be appropriated for such contributions by this paragraph are in addition to any funds otherwise available

for such contributions. Funds authorized to be appropriated by this paragraph are authorized to be made available until expended.

(b) CIVIL ACTIONS INVOLVING THE COMMISSION.—For the purpose of any civil action which may be brought within the United States by or against the Border Environment Cooperation Commission in accordance with the Border Environment Cooperation Agreement (including an action brought to enforce an arbitral award against the Commission), the Commission shall be deemed to be an inhabitant of the Federal judicial district in which its principal office within the United States, or its agent appointed for the purpose of accepting service or notice of service, is located. Any such action to which the Commission is a party shall be deemed to arise under the laws of the United States, and the district courts of the United States (including the courts enumerated in section 460 of title 28, United States Code) shall have original jurisdiction of any such action. When the Commission is a defendant in any action in a State court, it may at any time before trial remove the action into the appropriate district court of the United States by following the procedure for removal provided in section 1446 of title 28, United States Code.

(c) DEFINITIONS.—As used in this section—

(1) the term "Border Environment Cooperation Agreement" means the November 1993 Agreement Between the Government of the United States of America and the Government of the United Mexican States Concerning the Establishment of a Border Environment Cooperation Commission and a North American Development Bank;

(2) the terms "Border Environment Cooperation Commission" and "Commission" mean the commission established pursuant to Chapter I of the Border Environment Cooperation Agreement; and

(3) the term "United States" means the United States, its territories and possessions, and the Commonwealth of Puerto Rico.

PART 2—NORTH AMERICAN DEVELOPMENT BANK AND RELATED PROVISIONS

SEC. 541. NORTH AMERICAN DEVELOPMENT BANK.

(a) ACCEPTANCE OF MEMBERSHIP.—The President is hereby authorized to accept membership for the United States in the North American Development Bank (hereafter in this part referred to as the "Bank") provided for in Chapter II of the Border Environment Cooperation Agreement (hereafter in this part referred to as the "Cooperation Agreement").

(b) SUBSCRIPTION OF STOCK.—

(1) SUBSCRIPTION AUTHORITY.—

(A) IN GENERAL.—The Secretary of the Treasury may subscribe on behalf of the United States up to 150,000 shares of the capital stock of the Bank.

(B) EFFECTIVENESS OF SUBSCRIPTION.—Except as provided in paragraph (3), any such subscription shall be effective only to such extent or in such amounts as are provided in advance in appropriations Acts.

(2) LIMITATIONS ON AUTHORIZATION OF APPROPRIATIONS.—For payment by the Secretary of the Treasury of the subscrip-

tion of the United States for shares described in paragraph (1), there are authorized to be appropriated $1,500,000,000 ($225,000,000 of which may be used for paid-in capital and $1,275,000,000 of which may be used for callable capital) without fiscal year limitation.

(3) FUNDING; LIMITATION ON CALLABLE CAPITAL SUBSCRIPTIONS.—

(A) FUNDING.—For fiscal year 1995, the Secretary of the Treasury shall pay to the Bank out of any sums in the Treasury not otherwise appropriated the sum of $56,250,000 for the paid-in portion of the United States share of the capital stock of the Bank, 10 percent of which may be transferred by the Bank to the President pursuant to section 543 to pay for the cost of direct and guaranteed Federal loans.

(B) LIMITATION ON CALLABLE CAPITAL SUBSCRIPTIONS.—For fiscal year 1995, the Secretary of the Treasury shall subscribe to the callable capital portion of the United States share of the capital stock of the Bank in an amount not to exceed $318,750,000.

(4) DISPOSITION OF NET INCOME DISTRIBUTED BY THE FACILITY.—Any payment made to the United States by the Bank as a distribution of net income shall be covered into the Treasury as a miscellaneous receipt.

(c) COMPENSATION OF BOARD MEMBERS.—No person shall be entitled to receive any salary or other compensation from the Bank or the United States for services as a Board member.

(d) APPLICABILITY OF BRETTON WOODS AGREEMENTS ACT.—The provisions of section 4 of the Bretton Woods Agreements Act shall apply with respect to the Bank to the same extent as with respect to the International Bank for Reconstruction and Development and the International Monetary Fund.

(e) RESTRICTIONS.—Unless authorized by law, neither the President nor any person or agency shall, on behalf of the United States—

(1) subscribe to additional shares of stock of the Bank;

(2) vote for or agree to any amendment of the Cooperation Agreement which increases the obligations of the United States, or which changes the purpose or functions of the Bank; or

(3) make a loan or provide other financing to the Bank.

(f) FEDERAL RESERVE BANKS AS DEPOSITORIES.—Any Federal Reserve bank that is requested to do so by the Bank shall act as its depository or as its fiscal agent, and the Board of Governors of the Federal Reserve System shall supervise and direct the carrying out of these functions by the Federal Reserve banks.

(g) JURISDICTION OF UNITED STATES COURTS AND ENFORCEMENT OF ARBITRAL AWARDS.—For the purpose of any civil action which may be brought within the United States, its territories or possessions, or the Commonwealth of Puerto Rico, by or against the Bank in accordance with the Cooperation Agreement, including an action brought to enforce an arbitral award against the Bank, the Bank shall be deemed to be an inhabitant of the Federal judicial district in which its principal office within the United States or its agency appointed for the purpose of accepting service or notice of service is located, and any such action to which the Bank shall be a party shall be deemed to arise under the laws of the United States, and the district courts of the United States,

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including the courts enumerated in section 460 of title 28, United States Code, shall have original jurisdiction of any such action. When the Bank is a defendant in any action in a State court, it may at any time before trial remove the action into the appropriate district court of the United States by following the procedure for removal provided in section 1446 of title 28, United States Code.

(h) EXEMPTION FROM SECURITIES LAWS FOR CERTAIN SECURITIES ISSUED BY THE BANK; REPORTS REQUIRED.—

(1) EXEMPTIONS FROM LIMITATIONS AND RESTRICTIONS ON THE POWER OF NATIONAL BANKING ASSOCIATIONS TO DEAL IN AND UNDERWRITE INVESTMENT SECURITIES OF THE BANK.—The seventh sentence of the seventh undesignated paragraph of section 5136 of the Revised Statutes of the United States (12 U.S.C. 24), is amended by inserting "the North American Development Bank," after "Inter-American Development Bank,".

(2) EXEMPTION FROM SECURITIES LAWS FOR CERTAIN SECURITIES ISSUED BY THE BANK; REPORTS REQUIRED.—Any securities issued by the Bank (including any guarantee by the Bank, whether or not limited in scope) in connection with the raising of funds for inclusion in the Bank's capital resources as defined in Section 4 of Article II of Chapter II of the Cooperation Agreement, and any securities guaranteed by the Bank as to both the principal and interest to which the commitment in Section 3(d) of Article II of Chapter II of the Cooperation Agreement is expressly applicable, shall be deemed to be exempted securities within the meaning of section 3(a)(2) of the Securities Act of 1933 (15 U.S.C. 77c), and section 3(a)(12) of the Securities Exchange Act of 1934 (15 U.S.C. 78c). The Bank shall file with the Securities and Exchange Commission such annual and other reports with regard to such securities as the Commission shall determine to be appropriate in view of the special character of the Bank and its operations and necessary in the public interest or for the protection of investors.

(3) AUTHORITY OF SECURITIES AND EXCHANGE COMMISSION TO SUSPEND EXEMPTION; REPORTS TO THE CONGRESS.—The Securities and Exchange Commission, acting in consultation with the National Advisory Council on International Monetary and Financial Problems, is authorized to suspend the provisions of paragraph (2) at any time as to any or all securities issued or guaranteed by the Bank during the period of such suspension. The Commission shall include in its annual reports to Congress such information as it shall deem advisable with regard to the operations and effect of this subsection and in connection therewith shall include any views submitted for such purpose by any association of dealers registered with the Commission.

SEC. 542. STATUS, IMMUNITIES, AND PRIVILEGES.

Article VIII of Chapter II of the Cooperation Agreement shall have full force and effect in the United States, its territories and possessions, and the Commonwealth of Puerto Rico, upon entry into force of the Cooperation Agreement.

SEC. 543. COMMUNITY ADJUSTMENT AND INVESTMENT PROGRAM.

(a) THE PRESIDENT.—(1) The President may enter into an agreement with the Bank that facilitates implementation by the President of a program for community adjustment and investment in support of the Agreement pursuant to chapter II of the Cooperation Agreement (hereafter in this section referred to as the "community adjustment and investment program").

(2) The President may receive from the Bank 10 percent of the paid-in capital actually paid to the Bank by the United States for the President to carry out, without further appropriations, through Federal agencies and their loan and loan guarantee programs, the community adjustment and investment program, pursuant to an agreement between the President and the Bank.

(3) The President may select one or more Federal agencies that make loans or guarantee the repayment of loans to assist in carrying out the community adjustment and investment program, and may transfer the funds received from the Bank to such agency or agencies for the purpose of assisting in carrying out the community adjustment and investment program.

(4)(A) Each Federal agency selected by the President to assist in carrying out the community adjustment and investment program shall use the funds transferred to it by the President from the Bank to pay for the costs of direct and guaranteed loans, as defined in section 502 of the Congressional Budget Act of 1974, and, as appropriate, other costs associated with such loans, all subject to the restrictions and limitations that apply to such agency's existing loan or loan guarantee program.

(B) Funds transferred to an agency under subparagraph (A) shall be in addition to the amount of funds authorized in any appropriations Act to be expended by that agency for its loan or loan guarantee program.

(5) The President shall—

(A) establish guidelines for the loans and loan guarantees to be made under the community adjustment and investment program;

(B) endorse the grants made by the Bank for the community adjustment and investment program, as provided in Article I, section 1(b), and Article III, section 11(a), of Chapter II of the Cooperation Agreement; and

(C) endorse any loans or guarantees made by the Bank for the community adjustment and investment program, as provided in Article I, section 1(b), and Article III, section 6 (a) and (c) of Chapter II of the Cooperation Agreement.

(b) ADVISORY COMMITTEE.—

(1) ESTABLISHMENT.—The President shall establish an advisory committee to be known as the Community Adjustment and Investment Program Advisory Committee (in this section referred to as the "Advisory Committee") in accordance with the provisions of the Federal Advisory Committee Act.

(2) MEMBERSHIP.—

(A) IN GENERAL.—The Advisory Committee shall consist of 9 members of the public, appointed by the President, who, collectively, represent—

(i) community groups whose constituencies include low-income families;

(ii) any scientific, professional, business, nonprofit, or public interest organization or association which is neither affiliated with, nor under the direction of, a government;

(iii) for-profit business interests; and

(iv) other appropriate entities with relevant expertise.

(B) REPRESENTATION.—Each of the categories described in clauses (i) through (iv) of subparagraph (A) shall be represented by no fewer than 1 and no more than 3 members of the Advisory Committee.

(3) FUNCTION.—It shall be the function of the Advisory Committee—

(A) to provide advice to the President regarding the implementation of the community adjustment and investment program, including advice on the guidelines to be established by the President for the loans and loan guarantees to be made pursuant to subsection (a)(4), advice on identifying the needs for adjustment assistance and investment in support of the goals and objectives of the Agreement, taking into account economic and geographic considerations, and advice on such other matters as may be requested by the President; and

(B) to review on a regular basis the operation of the community adjustment and investment program and provide the President with the conclusions of its review.

(4) TERMS OF MEMBERS.—

(A) IN GENERAL.—Each member of the Advisory Committee shall serve at the pleasure of the President.

(B) CHAIRPERSON.—The President shall appoint a chairperson from among the members of the Advisory Committee.

(C) MEETINGS.—The Advisory Committee shall meet at least annually and at such other times as requested by the President or the chairperson. A majority of the members of the Advisory Committee shall constitute a quorum.

(D) REIMBURSEMENT FOR EXPENSES.—The members of the Advisory Committee may receive reimbursement for travel, per diem, and other necessary expenses incurred in the performance of their duties, in accordance with the Federal Advisory Committee Act.

(E) STAFF AND FACILITIES.—The Advisory Committee may utilize the facilities and services of employees of any Federal agency without cost to the Advisory Committee, and any such agency is authorized to provide services as requested by the Committee.

(c) OMBUDSMAN.—The President shall appoint an ombudsman to provide the public with an opportunity to participate in the carrying out of the community adjustment and investment program.

(1) FUNCTION.—It shall be the function of the ombudsman—

(A) to establish procedures for receiving comments from the general public on the operation of the community adjustment and investment program, to receive such comments, and to provide the President with summaries of the public comments; and

(B) to perform an independent inspection and programmatic audit of the operation of the community adjustment and investment program and to provide the President with the conclusions of its investigation and audit.

(2) AUTHORIZATION OF APPROPRIATIONS.—There are authorized to be appropriated to the President, or such agency as

the President may designate, $25,000 for fiscal year 1995 and for each fiscal year thereafter, for the costs of the ombudsman.

(d) REPORTING REQUIREMENT.—The President shall submit to the appropriate congressional committees an annual report on the community adjustment and investment program (if any) that is carried out pursuant to this section. Each report shall state the amount of the loans made or guaranteed during the 12-month period ending on the day before the date of the report.

SEC. 544. DEFINITION.

For purposes of this part, the term "Border Environment Cooperation Agreement" (referred to in this part as the "Cooperation Agreement") means the November 1993 Agreement Between the Government of the United States of America and the Government of the United Mexican States Concerning the Establishment of a Border Environment Cooperation Commission and a North American Development Bank.

TITLE VI—CUSTOMS MODERNIZATION

SEC. 601. REFERENCE.

Whenever in subtitle A, B, or C an amendment or repeal is expressed in terms of an amendment to, or repeal of, a part, section, subsection, or other provision, the reference shall be considered to be made a part, section, subsection, or other provision of the Tariff Act of 1930 (19 U.S.C. 1202 et seq.).

Subtitle A—Improvements in Customs Enforcement

SEC. 611. PENALTIES FOR VIOLATIONS OF ARRIVAL, REPORTING, ENTRY, AND CLEARANCE REQUIREMENTS.

Section 436 (19 U.S.C. 1436) is amended—

(1) by amending subsection (a)—

(A) by striking out "433" in paragraph (1) and inserting "431, 433, or 434 of this Act or section 4197 of the Revised Statutes of the United States (46 U.S.C. App. 91)",

(B) by amending paragraph (2) to read as follows:

"(2) to present or transmit, electronically or otherwise, any forged, altered, or false document, paper, information, data or manifest to the Customs Service under section 431(e), 433(d), or 434 of this Act or section 4197 of the Revised Statutes of the United States (46 U.S.C. App. 91) without revealing the facts; or", and

(C) by amending paragraph (3) to read as follows:

"(3) to fail to make entry or to obtain clearance as required by section 434 or 644 of this Act, section 4197 of the Revised Statutes of the United States (46 U.S.C. App. 91), or section 1109 of the Federal Aviation Act of 1958 (49 U.S.C. App. 1509); or"; and

(2) by striking out "**AND ENTRY**" in the section heading and inserting "**ENTRY, AND CLEARANCE**".

SEC. 612. FAILURE TO DECLARE.

Section 497(a) (19 U.S.C. 1497(a)) is amended—

(1) by inserting "or transmitted" after "made" in paragraph (1)(A); and

(2) by amending paragraph (2)(A) to read as follows:

"(A) if the article is a controlled substance, either $500 or an amount equal to 1,000 percent of the value of the article, whichever amount is greater; and".

SEC. 613. CUSTOMS TESTING LABORATORIES; DETENTION OF MERCHANDISE.

(a) AMENDMENT.—Section 499 (19 U.S.C. 1499) is amended to read as follows:

"SEC. 499. EXAMINATION OF MERCHANDISE.

"(a) ENTRY EXAMINATION.—

"(1) IN GENERAL.—Imported merchandise that is required by law or regulation to be inspected, examined, or appraised shall not be delivered from customs custody (except under such bond or other security as may be prescribed by the Secretary to assure compliance with all applicable laws, regulations, and instructions which the Secretary or the Customs Service is authorized to enforce) until the merchandise has been inspected, appraised, or examined and is reported by the Customs Service to have been truly and correctly invoiced and found to comply with the requirements of the laws of the United States.

"(2) EXAMINATION.—The Customs Service—

"(A) shall designate the packages or quantities of merchandise covered by any invoice or entry which are to be opened and examined for the purpose of appraisement or otherwise;

"(B) shall order such packages or quantities to be sent to such place as is designated by the Secretary by regulation for such purpose;

"(C) may require such additional packages or quantities as the Secretary considers necessary for such purpose; and

"(D) shall inspect a sufficient number of shipments, and shall examine a sufficient number of entries, to ensure compliance with the laws enforced by the Customs Service.

"(3) UNSPECIFIED ARTICLES.—If any package contains any article not specified in the invoice or entry and, in the opinion of the Customs Service, the article was omitted from the invoice or entry—

"(A) with fraudulent intent on the part of the seller, shipper, owner, agent, importer of record, or entry filer, the contents of the entire package in which such article is found shall be subject to seizure; or

"(B) without fraudulent intent, the value of the article shall be added to the entry and the duties, fees, and taxes thereon paid accordingly.

"(4) DEFICIENCY.—If a deficiency is found in quantity, weight, or measure in the examination of any package, the person finding the deficiency shall make a report thereof to the Customs Service. The Customs Service shall make allowance for the deficiency in the liquidation of duties.

"(5) INFORMATION REQUIRED FOR RELEASE.—If an examination is conducted, any information required for release shall be provided, either electronically or in paper form, to the Customs Service at the port of examination. The absence of such information does not limit the authority of the Customs Service to conduct an examination.

"(b) TESTING LABORATORIES.—

"(1) ACCREDITATION OF PRIVATE TESTING LABORATORIES.—The Customs Service shall establish and implement a procedure, under regulations promulgated by the Secretary, for accrediting private laboratories within the United States which may be used to perform tests (that would otherwise be performed by Customs Service laboratories) to establish the characteristics, quantities, or composition of imported merchandise. Such regulations—

"(A) shall establish the conditions required for the laboratories to receive and maintain accreditation for purposes of this subsection;

"(B) shall establish the conditions regarding the suspension and revocation of accreditation, which may include the imposition of a monetary penalty not to exceed $100,000 and such penalty is in addition to the recovery, from a gauger or laboratory accredited under paragraph (1), of any loss of revenue that may have occurred, but the Customs Service—

"(i) may seek to recover lost revenue only in cases where the gauger or laboratory intentionally falsified the analysis or gauging report in collusion with the importer; and

"(ii) shall neither assess penalties nor seek to recover lost revenue because of a good faith difference of professional opinion; and

"(C) may provide for the imposition of a reasonable charge for accreditation and periodic reaccreditation.

The collection of any charge for accreditation and reaccreditation under this section is not prohibited by section 13031(e)(6) of the Consolidated Omnibus Budget Reconciliation Act of 1985 (19 U.S.C. 58c(e)(6)).

"(2) APPEAL OF ADVERSE ACCREDITATION DECISIONS.—A laboratory applying for accreditation, or that is accredited, under this section may contest any decision or order of the Customs Service denying, suspending, or revoking accreditation, or imposing a monetary penalty, by commencing an action in accordance with chapter 169 of title 28, United States Code, in the Court of International Trade within 60 days after issuance of the decision or order.

"(3) TESTING BY ACCREDITED LABORATORIES.—When requested by an importer of record of merchandise, the Customs Service shall authorize the release to the importer of a representative sample of the merchandise for testing, at the expense of the importer, by a laboratory accredited under paragraph (1). The testing results from a laboratory accredited under paragraph (1) that are submitted by an importer of record with respect to merchandise in an entry shall, in the absence of testing results obtained from a Customs Service laboratory, be accepted by the Customs Service if the importer of record certifies that the sample tested was taken from the merchandise in the entry. Nothing in this subsection shall be construed to limit in any way or preclude the authority of the Customs Service to test or analyze any sample or merchandise independently.

"(4) AVAILABILITY OF TESTING PROCEDURE, METHODOLOGIES, AND INFORMATION.—Testing procedures and methodologies used by the Customs Service, and information resulting from any testing conducted by the Customs Service, shall be made available as follows:

"(A) Testing procedures and methodologies shall be made available upon request to any person unless the procedures or methodologies are—

"(i) proprietary to the holder of a copyright or patent related to such procedures or methodologies, or

"(ii) developed by the Customs Service for enforcement purposes.

"(B) Information resulting from testing shall be made available upon request to the importer of record and any agent thereof unless the information reveals information which is—

"(i) proprietary to the holder of a copyright or patent; or

"(ii) developed by the Customs Service for enforcement purposes.

"(5) MISCELLANEOUS PROVISIONS.—For purposes of this subsection—

"(A) any reference to a private laboratory includes a reference to a private gauger; and

"(B) accreditation of private laboratories extends only to the performance of functions by such laboratories that are within the scope of those responsibilities for determinations of the elements relating to admissibility, quantity, composition, or characteristics of imported merchandise that are vested in, or delegated to, the Customs Service.

"(c) DETENTIONS.—Except in the case of merchandise with respect to which the determination of admissibility is vested in an agency other than the Customs Service, the following apply:

"(1) IN GENERAL.—Within the 5-day period (excluding weekends and holidays) following the date on which merchandise is presented for customs examination, the Customs Service shall decide whether to release or detain the merchandise. Merchandise which is not released within such 5-day period shall be considered to be detained merchandise.

"(2) NOTICE OF DETENTION.—The Customs Service shall issue a notice to the importer or other party having an interest in detained merchandise no later than 5 days, excluding weekends and holidays, after the decision to detain the merchandise is made. The notice shall advise the importer or other interested party of—

"(A) the initiation of the detention;

"(B) the specific reason for the detention;

"(C) the anticipated length of the detention;

"(D) the nature of the tests or inquiries to be conducted; and

"(E) the nature of any information which, if supplied to the Customs Service, may accelerate the disposition of the detention.

"(3) TESTING RESULTS.—Upon request by the importer or other party having an interest in detained merchandise, the Customs Service shall provide the party with copies of the results of any testing conducted by the Customs Service on the merchandise and a description of the testing procedures and methodologies (unless such procedures or methodologies are proprietary to the holder of a copyright or patent or were developed by the Customs Service for enforcement purposes). The results and test description shall be in sufficient detail to permit the duplication and analysis of the testing and the results.

"(4) SEIZURE AND FORFEITURE.—If otherwise provided by law, detained merchandise may be seized and forfeited.

"(5) EFFECT OF FAILURE TO MAKE DETERMINATION.—

"(A) The failure by the Customs Service to make a final determination with respect to the admissibility of detained merchandise within 30 days after the merchandise has been presented for customs examination, or such longer period if specifically authorized by law, shall be treated as a decision of the Customs Service to exclude the merchandise for purposes of section 514(a)(4).

"(B) For purposes of section 1581 of title 28, United States Code, a protest against the decision to exclude the merchandise which has not been allowed or denied in whole or in part before the 30th day after the day on which the protest was filed shall be treated as having been denied on such 30th day.

"(C) Notwithstanding section 2639 of title 28, United States Code, once an action respecting a detention is commenced, unless the Customs Service establishes by a preponderance of the evidence that an admissibility decision has not been reached for good cause, the court shall grant the appropriate relief which may include, but is not limited to, an order to cancel the detention and release the merchandise.".

(b) EXISTING LABORATORIES.—Accreditation under section 499(b) of the Tariff Act of 1930 (as added by subsection (a)) is not required for any private laboratory (including any gauger) that was accredited or approved by the Customs Service as of the day before the date of the enactment of this Act; but any such laboratory is subject to reaccreditation under the provisions of such section and the regulations promulgated thereunder.

SEC. 614. RECORDKEEPING.

Section 508 (19 U.S.C. 1508) is amended—

(1) by amending subsection (a) to read as follows:

"(a) REQUIREMENTS.—Any—

"(1) owner, importer, consignee, importer of record, entry filer, or other party who—

"(A) imports merchandise into the customs territory of the United States, files a drawback claim, or transports or stores merchandise carried or held under bond, or

"(B) knowingly causes the importation or transportation or storage of merchandise carried or held under bond into or from the customs territory of the United States;

"(2) agent of any party described in paragraph (1); or

"(3) person whose activities require the filing of a declaration or entry, or both;

shall make, keep, and render for examination and inspection records (which for purposes of this section include, but are not limited to, statements, declarations, documents and electronically generated or machine readable data) which—

"(A) pertain to any such activity, or to the information contained in the records required by this Act in connection with any such activity; and

"(B) are normally kept in the ordinary course of business."; and

(2) by amending subsection (c) to read as follows:

"(c) PERIOD OF TIME.—The records required by subsections (a) and (b) shall be kept for such period of time, not to exceed 5 years from the date of entry or exportation, as appropriate, as the Secretary shall prescribe; except that records for any drawback claim shall be kept until the 3rd anniversary of the date of payment of the claim.".

SEC. 615. EXAMINATION OF BOOKS AND WITNESSES.

Section 509 (19 U.S.C. 1509) is amended as follows:

(1) Subsection (a) is amended—

(A) by striking out "and taxes" wherever it appears and inserting ", fees and taxes";

(B) by amending paragraph (1) to read as follows:

"(1) examine, or cause to be examined, upon reasonable notice, any record (which for purposes of this section, includes, but is not limited to, any statement, declaration, document, or electronically generated or machine readable data) described in the notice with reasonable specificity, which may be relevant to such investigation or inquiry, except that—

"(A) if such record is required by law or regulation for the entry of the merchandise (whether or not the Customs Service required its presentation at the time of entry) it shall be provided to the Customs Service within a reasonable time after demand for its production is made, taking into consideration the number, type, and age of the item demanded; and

"(B) if a person of whom demand is made under subparagraph (A) fails to comply with the demand, the person may be subject to penalty under subsection (g);";

(C) by amending that part of paragraph (2) that precedes subparagraph (D) to read as follows:

"(2) summon, upon reasonable notice—

"(A) the person who—

"(i) imported, or knowingly caused to be imported, merchandise into the customs territory of the United States,

"(ii) exported merchandise, or knowingly caused merchandise to be exported, to Canada,

"(iii) transported or stored merchandise that was or is carried or held under customs bond, or knowingly caused such transportation or storage, or

"(iv) filed a declaration, entry, or drawback claim with the Customs Service;

"(B) any officer, employee, or agent of any person described in subparagraph (A);

"(C) any person having possession, custody or care of records relating to the importation or other activity described in subparagraph (A); or"; and

(D) by striking out the comma at the end of subparagraph (D) and inserting a semicolon.

(2) Subsections (b) and (c) are redesignated as subsections (c) and (d), respectively.

(3) The following new subsection is inserted after subsection (a):

"(b) REGULATORY AUDIT PROCEDURES.—

"(1) In conducting a regulatory audit under this section (which does not include a quantity verification for a customs bonded warehouse or general purpose foreign trade zone), the Customs Service auditor shall provide the person being audited, in advance of the audit, with a reasonable estimate of the time to be required for the audit. If in the course of an audit it becomes apparent that additional time will be required, the Customs Service auditor shall immediately provide a further estimate of such additional time.

"(2) Before commencing an audit, the Customs Service auditor shall inform the party to be audited of his right to an entry conference at which time the purpose will be explained and an estimated termination date set. Upon completion of on-site audit activities, the Customs Service auditor shall schedule a closing conference to explain the preliminary results of the audit.

"(3) Except as provided in paragraph (5), if the estimated or actual termination date for an audit passes without the Customs Service auditor providing a closing conference to explain the results of the audit, the person being audited may petition in writing for such a conference to the appropriate regional commissioner, who, upon receipt of such a request, shall provide for such a conference to be held within 15 days after the date of receipt.

"(4) Except as provided in paragraph (5), the Customs Service auditor shall complete the formal written audit report within 90 days following the closing conference unless the appropriate regional commissioner provides written notice to the person being audited of the reason for any delay and the anticipated completion date. After application of any exemption contained in section 552 of title 5, United States Code, a copy of the formal written audit report shall be sent to the person audited no later than 30 days following completion of the report.

"(5) Paragraphs (3) and (4) shall not apply after the Customs Service commences a formal investigation with respect to the issue involved.".

(4) Subsection (d) (as redesignated by paragraph (2)) is amended—

(A) by striking out "statements, declarations, or documents" in paragraph (1)(A) and inserting "those";

(B) by inserting ", unless such customhouse broker is the importer of record on an entry" after "broker" in paragraph (1)(C)(i);

(C) by striking out "import" in each of paragraphs (2)(B) and (4)(B);

(D) by inserting "described in section 508" after "transactions" in each of paragraphs (2)(B) and (4)(B); and

(E) by inserting ", fees," after "duties" in paragraph (4)(A).

(5) The following new subsections are added at the end thereof:

"(e) LIST OF RECORDS AND INFORMATION.—The Customs Service shall identify and publish a list of the records or entry information that is required to be maintained and produced under subsection (a)(1)(A).

"(f) RECORDKEEPING COMPLIANCE PROGRAM.—

"(1) IN GENERAL.—After consultation with the importing community, the Customs Service shall by regulation establish a recordkeeping compliance program which the parties listed in section 508(a) may participate in after being certified by the Customs Service under paragraph (2). Participation in the recordkeeping compliance program by recordkeepers is voluntary.

"(2) CERTIFICATION.—A recordkeeper may be certified as a participant in the recordkeeping compliance program after meeting the general recordkeeping requirements established under the program or after negotiating an alternative program suited to the needs of the recordkeeper and the Customs Service. Certification requirements shall take into account the size and nature of the importing business and the volume of imports. In order to be certified, the recordkeeper must be able to demonstrate that it—

"(A) understands the legal requirements for recordkeeping, including the nature of the records required to be maintained and produced and the time periods involved;

"(B) has in place procedures to explain the recordkeeping requirements to those employees who are involved in the preparation, maintenance, and production of required records;

"(C) has in place procedures regarding the preparation and maintenance of required records, and the production of such records to the Customs Service;

"(D) has designated a dependable individual or individuals to be responsible for recordkeeping compliance under the program and whose duties include maintaining familiarity with the recordkeeping requirements of the Customs Service;

"(E) has a record maintenance procedure approved by the Customs Service for original records, or, if approved by the Customs Service, for alternative records or recordkeeping formats other than the original records; and

"(F) has procedures for notifying the Customs Service of occurrences of variances to, and violations of, the requirements of the recordkeeping compliance program or the negotiated alternative programs, and for taking corrective action when notified by the Customs Service of violations or problems regarding such program.

"(g) PENALTIES.—

"(1) DEFINITION.—For purposes of this subsection, the term 'information' means any record, statement, declaration, document, or electronically stored or transmitted information or data referred to in subsection (a)(1)(A).

"(2) EFFECTS OF FAILURE TO COMPLY WITH DEMAND.—Except as provided in paragraph (4), if a person fails to comply with a lawful demand for information under subsection (a)(1)(A) the following provisions apply:

"(A) If the failure to comply is a result of the willful failure of the person to maintain, store, or retrieve the demanded information, such person shall be subject to a penalty, for each release of merchandise, not to exceed $100,000, or an amount equal to 75 percent of the appraised value of the merchandise, whichever amount is less.

"(B) If the failure to comply is a result of the negligence of the person in maintaining, storing, or retrieving the demanded information, such person shall be subject to a penalty, for each release of merchandise, not to exceed $10,000, or an amount equal to 40 percent of the appraised value of the merchandise, whichever amount is less.

"(C) In addition to any penalty imposed under subparagraph (A) or (B) regarding demanded information, if such information related to the eligibility of merchandise for a column 1 special rate of duty under title I, the entry of such merchandise—

"(i) if unliquidated, shall be liquidated at the applicable column 1 general rate of duty; or

"(ii) if liquidated within the 2-year period preceding the date of the demand, shall be reliquidated, notwithstanding the time limitation in section 514 or 520, at the applicable column 1 general rate of duty;

except that any liquidation or reliquidation under clause (i) or (ii) shall be at the applicable column 2 rate of duty if the Customs Service demonstrates that the merchandise should be dutiable at such rate.

"(3) AVOIDANCE OF PENALTY.—No penalty may be assessed under this subsection if the person can show—

"(A) that the loss of the demanded information was the result of an act of God or other natural casualty or disaster beyond the fault of such person or an agent of the person;

"(B) on the basis of other evidence satisfactory to the Customs Service, that the demand was substantially complied with; or

"(C) the information demanded was presented to and retained by the Customs Service at the time of entry or submitted in response to an earlier demand.

"(4) PENALTIES NOT EXCLUSIVE.—Any penalty imposed under this subsection shall be in addition to any other penalty provided by law except for—

"(A) a penalty imposed under section 592 for a material omission of the demanded information, or

"(B) disciplinary action taken under section 641.

"(5) REMISSION OR MITIGATION.—A penalty imposed under this section may be remitted or mitigated under section 618.

"(6) CUSTOMS SUMMONS.—Nothing in this subsection shall limit or preclude the Customs Service from issuing, or seeking the enforcement of, a customs summons.

"(7) ALTERNATIVES TO PENALTIES.—

"(A) IN GENERAL.—When a recordkeeper who—

"(i) has been certified as a participant in the recordkeeping compliance program under subsection (f); and

"(ii) is generally in compliance with the appropriate procedures and requirements of the program;

does not produce a demanded record or information for a specific release or provide the information by acceptable alternative means, the Customs Service, in the absence of willfulness or repeated violations, shall issue a written notice of the violation to the recordkeeper in lieu of a monetary penalty. Repeated violations by the recordkeeper may result in the issuance of penalties and removal of certification under the program until corrective action, satisfactory to the Customs Service, is taken.

"(B) CONTENTS OF NOTICE.—A notice of violation issued under subparagraph (A) shall—

"(i) state that the recordkeeper has violated the recordkeeping requirements;

"(ii) indicate the record or information which was demanded; and

"(iii) warn the recordkeeper that future failures to produce demanded records or information may result in the imposition of monetary penalties.

"(C) RESPONSE TO NOTICE.—Within a reasonable time after receiving written notice under subparagraph (A), the recordkeeper shall notify the Customs Service of the steps it has taken to prevent a recurrence of the violation.

"(D) REGULATIONS.—The Secretary shall promulgate regulations to implement this paragraph. Such regulations may specify the time periods for compliance with a demand for information and provide guidelines which define repeated violations for purposes of this paragraph. Any penalty issued for a recordkeeping violation shall take into account the degree of compliance compared to the total number of importations, the nature of the demanded records and the recordkeeper's cooperation.".

SEC. 616. JUDICIAL ENFORCEMENT.

The second sentence of section 510(a) (19 U.S.C. 1510(a)) is amended by inserting "and such court may assess a monetary penalty" after "as a contempt thereof".

SEC. 617. REVIEW OF PROTESTS.

Section 515 (19 U.S.C. 1515) is amended by inserting at the end the following new subsections:

"(c) If a protesting party believes that an application for further review was erroneously or improperly denied or was denied without authority for such action, it may file with the Commissioner of Customs a written request that the denial of the application for further review be set aside. Such request must be filed within 60 days after the date of the notice of the denial. The Commissioner of Customs may review such request and, based solely on the information before the Customs Service at the time the application for further review was denied, may set aside the denial of the application for further review and void the denial of protest, if appropriate. If the Commissioner of Customs fails to act within 60 days after the date of the request, the request shall be considered denied. All denials of protests are effective from the date of original denial for purposes of section 2636 of title 28, United States Code. If an action is commenced in the Court of International Trade that arises out of a protest or an application for further review, all administrative action pertaining to such protest or application shall terminate and any administrative action taken subsequent to the commencement of the action is null and void.

"(d) If a protest is timely and properly filed, but is denied contrary to proper instructions, the Customs Service may on its own initiative, or pursuant to a written request by the protesting party filed with the appropriate district director within 90 days after the date of the protest denial, void the denial of the protest.".

SEC. 618. REPEAL OF PROVISION RELATING TO RELIQUIDATION ON ACCOUNT OF FRAUD.

Section 521 (19 U.S.C. 1521) is repealed.

SEC. 619. PENALTIES RELATING TO MANIFESTS.

Section 584 (19 U.S.C. 1584) is amended—

(1) by amending subsection (a)—

(A) by striking out "appropriate customs officer" wherever it appears and inserting "Customs Service",

(B) by striking out "officer demanding the same" in paragraph (1) and inserting "officer (whether of the Customs Service or the Coast Guard) demanding the same", and

(C) by inserting "(electronically or otherwise)" after "submission" in the last sentence of paragraph (1); and

(2) by amending subsection (b)—

(A) by striking out "the appropriate customs officer", "he" (except in paragraph (1)(F)), and "such officer" wherever they appear and inserting "the Customs Service",

(B) by striking out "written" wherever it appears (other than paragraph (1)(F)),

(C) by inserting "or electronically transmit" after "issue" wherever it appears, and

(D) by striking out "his intention" in the first sentence of paragraph (1) and inserting "intent".

SEC. 620. UNLAWFUL UNLADING OR TRANSSHIPMENT.

Section 586 (19 U.S.C. 1586) is amended—

(1) by inserting ", or of a hovering vessel which has received or delivered merchandise while outside the territorial sea," after "from a foreign port or place" wherever it appears; and

(2) by amending subsection (f)—

(A) by striking out "the appropriate customs officer of the" and "the appropriate customs officer within the" and inserting "the Customs Service at the"; and

(B) by striking out "the appropriate customs officer is" and inserting "the Customs Service is".

SEC. 621. PENALTIES FOR FRAUD, GROSS NEGLIGENCE, AND NEGLIGENCE; PRIOR DISCLOSURE.

Section 592 (19 U.S.C. 1592) is amended—

(1) by inserting "or electronically transmitted data or information" after "document" in subsection (a)(1)(A)(i);

(2) by inserting "The mere nonintentional repetition by an electronic system of an initial clerical error does not con-

stitute a pattern of negligent conduct." at the end of subsection (a)(2);

(3) by amending subsection (b)—

(A) by amending the first sentence of paragraph (1)(A)—

(i) by striking out "the appropriate customs officer" and inserting "the Customs Service",

(ii) by striking out "he" and inserting "it", and

(iii) by striking out "his" and inserting "its", and

(B) by amending paragraph (2)—

(i) by striking out "the appropriate customs officer" wherever it appears and inserting "the Customs Service",

(ii) by striking out "such officer" wherever it appears and inserting "the Customs Service", and

(iii) by striking out "he" wherever it appears and inserting "it";

(4) by amending subsection (c)(4)—

(A) by striking "time of disclosure or within thirty days, or such longer period as the appropriate customs officer may provide, after notice by the appropriate customs officer of his" in subparagraph (A)(i) and by striking out "time of disclosure in 30 days, or such longer period as the appropriate customs officer may provide, after notice by the appropriate customs officer of his" in subparagraph (B), and inserting in each place "time of disclosure, or within 30 days (or such longer period as the Customs Service may provide) after notice by the Customs Service of its"; and

(B) by inserting after the last sentence the following: "For purposes of this section, a formal investigation of a violation is considered to be commenced with regard to the disclosing party and the disclosed information on the date recorded in writing by the Customs Service as the date on which facts and circumstances were discovered or information was received which caused the Customs Service to believe that a possibility of a violation of subsection (a) existed."; and

(5) by amending subsection (d)—

(A) by striking out "the appropriate customs officer" and inserting "the Customs Service",

(B) by striking out "duties" wherever it appears and inserting "duties, taxes, or fees", and

(C) by inserting ", TAXES OR FEES" after "DUTIES" in the sideheading.

SEC. 622. PENALTIES FOR FALSE DRAWBACK CLAIMS.

(a) AMENDMENT.—Part V of title IV is amended by inserting after section 593 the following new section:

"SEC. 593A. PENALTIES FOR FALSE DRAWBACK CLAIMS.

"(a) PROHIBITION.—

"(1) GENERAL RULE.—No person, by fraud, or negligence—

"(A) may seek, induce or affect, or attempt to seek, induce, or affect, the payment or credit to that person or others of any drawback claim by means of—

"(i) any document, written or oral statement, or electronically transmitted data or information, or act which is material and false, or

"(ii) any omission which is material; or

"(B) may aid or abet any other person to violate subparagraph (A).

"(2) EXCEPTION.—Clerical errors or mistakes of fact are not violations of paragraph (1) unless they are part of a pattern of negligent conduct. The mere nonintentional repetition by an electronic system of an initial clerical error does not constitute a pattern of negligent conduct.

"(b) PROCEDURES.—

"(1) PREPENALTY NOTICE.—

"(A) IN GENERAL.—If the Customs Service has reasonable cause to believe that there has been a violation of subsection (a) and determines that further proceedings are warranted, the Customs Service shall issue to the person concerned a written notice of intent to issue a claim for a monetary penalty. Such notice shall—

"(i) identify the drawback claim;

"(ii) set forth the details relating to the seeking, inducing, or affecting, or the attempted seeking, inducing, or affecting, or the aiding or procuring of, the drawback claim;

"(iii) specify all laws and regulations allegedly violated;

"(iv) disclose all the material facts which establish the alleged violation;

"(v) state whether the alleged violation occurred as a result of fraud or negligence;

"(vi) state the estimated actual or potential loss of revenue due to the drawback claim, and, taking into account all circumstances, the amount of the proposed monetary penalty; and

"(vii) inform such person that he shall have a reasonable opportunity to make representations, both oral and written, as to why a claim for a monetary penalty should not be issued in the amount stated.

"(B) EXCEPTIONS.—The Customs Service may not issue a prepenalty notice if the amount of the penalty in the penalty claim issued under paragraph (2) is $1,000 or less. In such cases, the Customs Service may proceed directly with a penalty claim.

"(C) PRIOR APPROVAL.—No prepenalty notice in which the alleged violation occurred as a result of fraud shall be issued without the prior approval of Customs Headquarters.

"(2) PENALTY CLAIM.—After considering representations, if any, made by the person concerned pursuant to the notice issued under paragraph (1), the Customs Service shall determine whether any violation of subsection (a), as alleged in the notice, has occurred. If the Customs Service determines that there was no violation, the Customs Service shall promptly issue a written statement of the determination to the person to whom the notice was sent. If the Customs Service determines that there was a violation, Customs shall issue a written penalty claim to such person. The written penalty claim shall specify all changes in the information provided under clauses (i) through (vii) of paragraph (1)(A). Such person shall have a reasonable opportunity under section 618 to make representations, both oral and written, seeking remission or mitigation of the monetary penalty. At the conclusion of any proceeding under section 618, the Customs Service shall provide to the person concerned a written statement which sets forth the final determination, and the findings of fact and conclusions of law on which such determination is based.

"(c) MAXIMUM PENALTIES.—

"(1) FRAUD.—A fraudulent violation of subsection (a) of this section is punishable by a civil penalty in an amount not to exceed 3 times the actual or potential loss of revenue.

"(2) NEGLIGENCE.—

"(A) IN GENERAL.—A negligent violation of subsection (a) is punishable by a civil penalty in an amount not to exceed 20 percent of the actual or potential loss of revenue for the 1st violation.

"(B) REPETITIVE VIOLATIONS.—If the Customs Service determines that a repeat negligent violation occurs relating to the same issue, the penalty amount for the 2d violation shall be in an amount not to exceed 50 percent of the total actual or potential loss of revenue. The penalty amount for each succeeding repetitive negligent violation shall be in an amount not to exceed the actual or potential loss of revenue. If the same party commits a nonrepetitive violation, that violation shall be subject to a penalty not to exceed 20 percent of the actual or potential loss of revenue.

"(3) PRIOR DISCLOSURE.—

"(A) IN GENERAL.—Subject to subparagraph (B), if the person concerned discloses the circumstances of a violation of subsection (a) before, or without knowledge of the commencement of, a formal investigation of such violation, the monetary penalty assessed under this subsection may not exceed—

"(i) if the violation resulted from fraud, an amount equal to the actual or potential revenue of which the United States is or may be deprived as a result of overpayment of the claim; or

"(ii) if the violation resulted from negligence, an amount equal to the interest computed on the basis of the prevailing rate of interest applied under section 6621 of the Internal Revenue Code of 1986 on the amount of actual revenue of which the United States is or may be deprived during the period that—

"(I) begins on the date of the overpayment of the claim; and

"(II) ends on the date on which the person concerned tenders the amount of the overpayment.

"(B) CONDITION AFFECTING PENALTY LIMITATIONS.—The limitations in subparagraph (A) on the amount of the monetary penalty to be assessed under subsection (c) apply only if the person concerned tenders the amount of the overpayment made on the claim at the time of disclosure, or within 30 days (or such longer period as the Customs

Service may provide), after notice by the Customs Service of its calculation of the amount of the overpayment.

"(C) BURDEN OF PROOF.—The person asserting lack of knowledge of the commencement of a formal investigation has the burden of proof in establishing such lack of knowledge.

"(4) COMMENCEMENT OF INVESTIGATION.—For purposes of this section, a formal investigation of a violation is considered to be commenced with regard to the disclosing party and the disclosed information on the date recorded in writing by the Customs Service as the date on which facts and circumstances were discovered or information was received which caused the Customs Service to believe that a possibility of a violation of subsection (a) existed.

"(5) EXCLUSIVITY.—Penalty claims under this section shall be the exclusive civil remedy for any drawback related violation of subsection (a).

"(d) DEPRIVATION OF LAWFUL REVENUE.—Notwithstanding section 514, if the United States has been deprived of lawful duties and taxes resulting from a violation of subsection (a), the Customs Service shall require that such duties and taxes be restored whether or not a monetary penalty is assessed.

"(e) DRAWBACK COMPLIANCE PROGRAM.—

"(1) IN GENERAL.—After consultation with the drawback trade community, the Customs Service shall establish a drawback compliance program in which claimants and other parties in interest may participate after being certified by the Customs Service under paragraph (2). Participation in the drawback compliance program is voluntary.

"(2) CERTIFICATION.—A party may be certified as a participant in the drawback compliance program after meeting the general requirements established under the program or after negotiating an alternative program suited to the needs of the party and the Customs Service. Certification requirements shall take into account the size and nature of the party's drawback program and the volume of claims. In order to be certified, the participant must be able to demonstrate that it—

"(A) understands the legal requirements for filing claims, including the nature of the records required to be maintained and produced and the time periods involved;

"(B) has in place procedures to explain the Customs Service requirements to those employees that are involved in the preparation of claims, and the maintenance and production of required records;

"(C) has in place procedures regarding the preparation of claims and maintenance of required records, and the production of such records to the Customs Service;

"(D) has designated a dependable individual or individuals to be responsible for compliance under the program and whose duties include maintaining familiarity with the drawback requirements of the Customs Service;

"(E) has a record maintenance procedure approved by the Customs Service for original records, or, if approved by the Customs Service, for alternate records or recordkeeping formats other than the original records; and

"(F) has procedures for notifying the Customs Service of variances to, and violations of, the requirements of the drawback compliance program or any negotiated alternative programs, and for taking corrective action when notified by the Customs Service for violations or problems regarding such program.

"(f) ALTERNATIVES TO PENALTIES.—

"(1) IN GENERAL.—When a party that—

"(A) has been certified as a participant in the drawback compliance program under subsection (e); and

"(B) is generally in compliance with the appropriate procedures and requirements of the program;

commits a violation of subsection (a), the Customs Service, shall, in the absence of fraud or repeated violations, and in lieu of a monetary penalty, issue a written notice of the violation to the party. Repeated violations by a party may result in the issuance of penalties and removal of certification under the program until corrective action, satisfactory to the Customs Service, is taken.

"(2) CONTENTS OF NOTICE.—A notice of violation issued under paragraph (1) shall—

"(A) state that the party has violated subsection (a);

"(B) explain the nature of the violation; and

"(C) warn the party that future violations of subsection (a) may result in the imposition of monetary penalties.

"(3) RESPONSE TO NOTICE.—Within a reasonable time after receiving written notice under paragraph (1), the party shall notify the Customs Service of the steps it has taken to prevent a recurrence of the violation.

"(g) REPETITIVE VIOLATIONS.—

"(1) A party who has been issued a written notice under subsection (f)(1) and subsequently commits a repeat negligent violation involving the same issue is subject to the following monetary penalties:

"(A) 2D VIOLATION.—An amount not to exceed 20 percent of the loss of revenue.

"(B) 3RD VIOLATION.—An amount not to exceed 50 percent of the loss of revenue.

"(C) 4TH AND SUBSEQUENT VIOLATIONS.—An amount not to exceed 100 percent of the loss of revenue.

"(2) If a party that has been certified as a participant in the drawback compliance program under subsection (e) commits an alleged violation which was not repetitive, the party shall be issued a 'warning letter', and, for any subsequent violation, shall be subject to the same maximum penalty amounts stated in paragraph (1).

"(h) REGULATION.—The Secretary shall promulgate regulations and guidelines to implement this section. Such regulations shall specify that for purposes of subsection (g), a repeat negligent violation involving the same issue shall be treated as a repetitive violation for a maximum period of 3 years.

"(i) COURT OF INTERNATIONAL TRADE PROCEEDINGS.—Notwithstanding any other provision of law, in any proceeding commenced by the United States in the Court of International Trade for the recovery of any monetary penalty claimed under this section—

"(1) all issues, including the amount of the penalty, shall be tried de novo;

"(2) if the monetary penalty is based on fraud, the United States shall have the burden of proof to establish the alleged violation by clear and convincing evidence; and

"(3) if the monetary penalty is based on negligence, the United States shall have the burden of proof to establish the act or omission constituting the violation, and the alleged violator shall have the burden of providing evidence that the act or omission did not occur as a result of negligence.".

(b) EFFECTIVE DATE.—The amendment made by subsection (a) applies to drawback claims filed on and after the nationwide operational implementation of an automated drawback selectivity program by the Customs Service. The Customs Service shall publish notice of this date in the Customs Bulletin.

SEC. 623. INTERPRETIVE RULINGS AND DECISIONS; PUBLIC INFORMATION.

Section 625 (19 U.S.C. 1625) is amended to read as follows:

"SEC. 625. INTERPRETIVE RULINGS AND DECISIONS; PUBLIC INFORMATION.

"(a) PUBLICATION.—Within 90 days after the date of issuance of any interpretive ruling (including any ruling letter, or internal advice memorandum) or protest review decision under this chapter with respect to any customs transaction, the Secretary shall have such ruling or decision published in the Customs Bulletin or shall otherwise make such ruling or decision available for public inspection.

"(b) APPEALS.—A person may appeal an adverse interpretive ruling and any interpretation of any regulation prescribed to implement such ruling to a higher level of authority within the Customs Service for de novo review. Upon a reasonable showing of business necessity, any such appeal shall be considered and decided no later than 60 days following the date on which the appeal is filed. The Secretary shall issue regulations to implement this subsection.

"(c) MODIFICATION AND REVOCATION.—A proposed interpretive ruling or decision which would—

"(1) modify (other than to correct a clerical error) or revoke a prior interpretive ruling or decision which has been in effect for at least 60 days; or

"(2) have the effect of modifying the treatment previously accorded by the Customs Service to substantially identical transactions;

shall be published in the Customs Bulletin. The Secretary shall give interested parties an opportunity to submit, during not less than the 30-day period after the date of such publication, comments on the correctness of the proposed ruling or decision. After consideration of any comments received, the Secretary shall publish a final ruling or decision in the Customs Bulletin within 30 days after the closing of the comment period. The final ruling or decision shall become effective 60 days after the date of its publication.

"(d) PUBLICATION OF CUSTOMS DECISIONS THAT LIMIT COURT DECISIONS.—A decision that proposes to limit the application of a court decision shall be published in the Customs Bulletin together with notice of opportunity for public comment thereon prior to a final decision.

"(e) PUBLIC INFORMATION.—The Secretary may make available in writing or through electronic media, in an efficient, comprehensive and timely manner, all information, including directives, memoranda, electronic messages and telexes which contain instructions, requirements, methods or advice necessary for importers and exporters to comply with the Customs laws and regulations. All information which may be made available pursuant to this subsection shall be subject to any exemption from disclosure provided by section 552 of title 5, United States Code.".

SEC. 624. SEIZURE AUTHORITY.

Section 596(c) (19 U.S.C. 1595a(c)) is amended to read as follows:

"(c) Merchandise which is introduced or attempted to be introduced into the United States contrary to law shall be treated as follows:

"(1) The merchandise shall be seized and forfeited if it—

"(A) is stolen, smuggled, or clandestinely imported or introduced;

"(B) is a controlled substance, as defined in the Controlled Substances Act (21 U.S.C. 801 et seq.), and is not imported in accordance with applicable law; or

"(C) is a contraband article, as defined in section 1 of the Act of August 9, 1939 (49 U.S.C. App. 781).

"(2) The merchandise may be seized and forfeited if—

"(A) its importation or entry is subject to any restriction or prohibition which is imposed by law relating to health, safety, or conservation and the merchandise is not in compliance with the applicable rule, regulation, or statute;

"(B) its importation or entry requires a license, permit or other authorization of an agency of the United States Government and the merchandise is not accompanied by such license, permit, or authorization;

"(C) it is merchandise or packaging in which copyright, trademark, or trade name protection violations are involved (including, but not limited to, violations of section 42, 43, or 45 of the Act of July 5, 1946 (15 U.S.C. 1124, 1125, or 1127), section 506 or 509 of title 17, United States Code, or section 2318 or 2320 of title 18, United States Code);

"(D) it is trade dress merchandise involved in the violation of a court order citing section 43 of such Act of July 5, 1946 (15 U.S.C. 1125);

"(E) it is merchandise which is marked intentionally in violation of section 304; or

"(F) it is merchandise for which the importer has received written notices that previous importations of identical merchandise from the same supplier were found to have been marked in violation of section 304.

"(3) If the importation or entry of the merchandise is subject to quantitative restrictions requiring a visa, permit, license, or other similar document, or stamp from the United States Government or from a foreign government or issuing authority pursuant to a bilateral or multilateral agreement, the merchandise shall be subject to detention in accordance with section 499 unless the appropriate visa, license, permit, or similar document or stamp is presented to the Customs Service; but if the visa, permit, license, or similar document or stamp which is presented in connection with the importation or entry of the merchandise is counterfeit, the merchandise may be seized and forfeited.

"(4) If the merchandise is imported or introduced contrary to a provision of law which governs the classification or value of merchandise and there are no issues as to the admissibility of the merchandise into the United States, it shall not be seized except in accordance with section 592.

"(5) In any case where the seizure and forfeiture of merchandise are required or authorized by this section, the Secretary may—

"(A) remit the forfeiture under section 618, or

"(B) permit the exportation of the merchandise, unless its release would adversely affect health, safety, or conservation or be in contravention of a bilateral or multilateral agreement or treaty.".

Subtitle B—National Customs Automation Program

SEC. 631. NATIONAL CUSTOMS AUTOMATION PROGRAM.

Part I of title IV is amended—

(1) by striking out

"PART I—DEFINITIONS

and inserting

"PART I—DEFINITIONS AND NATIONAL CUSTOMS AUTOMATION PROGRAM

"Subpart A—Definitions";

and

(2) by inserting after section 402 the following:

"Subpart B—National Customs Automation Program

"SEC. 411. NATIONAL CUSTOMS AUTOMATION PROGRAM.

"(a) ESTABLISHMENT.—The Secretary shall establish the National Customs Automation Program (hereinafter in this subpart referred to as the 'Program') which shall be an automated and electronic system for processing commercial importations and shall include the following existing and planned components:

"(1) Existing components:

"(A) The electronic entry of merchandise.

"(B) The electronic entry summary of required information.

"(C) The electronic transmission of invoice information.

"(D) The electronic transmission of manifest information.

"(E) Electronic payments of duties, fees, and taxes.

"(F) The electronic status of liquidation and reliquidation.

"(G) The electronic selection of high risk entries for examination (cargo selectivity and entry summary selectivity).

"(2) Planned components:

"(A) The electronic filing and status of protests.

"(B) The electronic filing (including remote filing under section 414) of entry information with the Customs Service at any location.

"(C) The electronic filing of import activity summary statements and reconciliation.

"(D) The electronic filing of bonds.

"(E) The electronic penalty process.

"(F) The electronic filing of drawback claims, records, or entries.

"(G) Any other component initiated by the Customs Service to carry out the goals of this subpart.

"(b) PARTICIPATION IN PROGRAM.—The Secretary shall by regulation prescribe the eligibility criteria for participation in the Program. Participation in the Program is voluntary.

"SEC. 412. PROGRAM GOALS.

"The goals of the Program are to ensure that all regulations and rulings that are administered or enforced by the Customs Service are administered and enforced in a manner that—

"(1) is uniform and consistent;

"(2) is as minimally intrusive upon the normal flow of business activity as practicable; and

"(3) improves compliance.

"SEC. 413. IMPLEMENTATION AND EVALUATION OF PROGRAM.

"(a) OVERALL PROGRAM PLAN.—

"(1) IN GENERAL.—Before the 180th day after the date of the enactment of this Act, the Secretary shall develop and transmit to the Committees an overall plan for the Program. The overall Program plan shall set forth—

"(A) a general description of the ultimate configuration of the Program;

"(B) a description of each of the existing components of the Program listed in section 411(a)(1); and

"(C) estimates regarding the stages on which planned components of the Program listed in section 411(a)(2) will be brought on-line.

"(2) ADDITIONAL INFORMATION.—In addition to the information required under paragraph (1), the overall Program plan shall include a statement regarding—

"(A) the extent to which the existing components of the Program currently meet, and the planned components will meet, the Program goals set forth in section 412; and

"(B) the effects that the existing components are currently having, and the effects that the planned components will likely have, on—

"(i) importers, brokers, and other users of the Program, and

"(ii) Customs Service occupations, operations, processes, and systems.

"(b) IMPLEMENTATION PLAN, TESTING, AND EVALUATION.—

"(1) IMPLEMENTATION PLAN.—For each of the planned components of the Program listed in section 411(a)(2), the Secretary shall—

"(A) develop an implementation plan;

"(B) test the component in order to assess its viability;

"(C) evaluate the component in order to assess its contribution toward achieving the program goals; and

"(D) transmit to the Committees the implementation plan, the testing results, and an evaluation report.

In developing an implementation plan under subparagraph (A) and evaluating components under subparagraph (C), the Secretary shall publish a request for comments in the Customs Bulletin and shall consult with the trade community, including importers, brokers, shippers, and other affected parties.

"(2) IMPLEMENTATION.—

"(A) The Secretary may implement on a permanent basis any Program component referred to in paragraph (1) on or after the date which is 30 days after paragraph (1)(D) is complied with.

"(B) For purposes of subparagraph (A), the 30 days shall be computed by excluding—

"(i) the days either House is not in session because of an adjournment of more than 3 days to a day certain or an adjournment of the Congress sine die, and

"(ii) any Saturday and Sunday, not excluded under clause (i), when either House is not in session.

"(3) EVALUATION AND REPORT.—The Secretary shall—

"(A) develop a user satisfaction survey of parties participating in the Program;

"(B) evaluate the results of the user satisfaction survey on a biennial basis (fiscal years) and transmit a report to the Committees on the evaluation by no later than the 90th day after the close of each 2d fiscal year;

"(C) with respect to the existing Program component listed in section 411(a)(1)(G) transmit to the Committees—

"(i) a written evaluation of such component before the 180th day after the date of the enactment of this section and before the implementation of the planned Program components listed in section 411(a)(2) (B) and (C), and

"(ii) a report on such component for each of the 3 full fiscal years occurring after the date of the enactment of this section, which report shall be transmitted not later than the 90th day after the close of each such year; and

"(D) not later than the 90th day after the close of fiscal year 1994, and annually thereafter through fiscal year 2000, transmit to the Committees a written evaluation with respect to the implementation and effect on users of each of the planned Program components listed in section 411(a)(2).

In carrying out the provisions of this paragraph, the Secretary shall publish requests for comments in the Customs Bulletin and shall consult with the trade community, including importers, brokers, shippers, and other affected parties.

"(c) COMMITTEES.—For purposes of this section, the term 'Committees' means the Committee on Ways and Means of the

House of Representatives and the Committee on Finance of the Senate.

"SEC. 414. REMOTE LOCATION FILING.

"(a) CORE ENTRY INFORMATION.—

"(1) IN GENERAL.—A Program participant may file electronically an entry of merchandise with the Customs Service from a location other than the district designated in the entry for examination (hereafter in this section referred to as a 'remote location') if—

"(A) the Customs Service is satisfied that the participant has the capabilities referred to in paragraph (2)(A) regarding such method of filing; and

"(B) the participant elects to file from the remote location.

"(2) REQUIREMENTS.—

"(A) IN GENERAL.—In order to qualify for filing from a remote location, a Program participant must have the capability to provide, on an entry-by-entry basis, for the following:

"(i) The electronic entry of merchandise.

"(ii) The electronic entry summary of required information.

"(iii) The electronic transmission of invoice information (when required by the Customs Service).

"(iv) The electronic payment of duties, fees, and taxes.

"(v) Such other electronic capabilities within the existing or planned components of the Program as the Secretary shall by regulation require.

"(B) RESTRICTION ON EXEMPTION FROM REQUIREMENTS.—The Customs Service may not permit any exemption or waiver from the requirements established by this section for participation in remote entry filing.

"(3) CONDITIONS ON FILING UNDER THIS SECTION.—The Secretary may prohibit a Program participant from participating in remote location filing, and may remove a Program participant from participation in remote location filing, if the participant—

"(i) fails to meet all the compliance requirements and operational standards of remote location filing; or

"(ii) fails to adhere to all applicable laws and regulations.

"(4) ALTERNATIVE FILING.—Any Program participant that is eligible to file entry information electronically from a remote location but chooses not to do so in the case of any entry must file any paper documentation for the entry at the designated location referred to in subsection (d).

"(b) ADDITIONAL ENTRY INFORMATION.—

"(1) IN GENERAL.—A Program participant that is eligible under subsection (a) to file entry information from a remote location may, if the Customs Service is satisfied that the participant meets the requirements under paragraph (2), also electronically file from the remote location additional information that is required by the Customs Service to be presented before the acceptance of entry summary information and at the time of acceptance of entry summary information.

"(2) REQUIREMENTS.—The Secretary shall publish, and periodically update, a list of those capabilities within the existing and planned components of the Program that a Program participant must have for purposes of this subsection.

"(3) FILING OF ADDITIONAL INFORMATION.—

"(A) IF INFORMATION ELECTRONICALLY ACCEPTABLE.—A Program participant that is eligible under paragraph (1) to file additional information from a remote location shall electronically file all such information that the Customs Service can accept electronically.

"(B) ALTERNATIVE FILING.—If the Customs Service cannot accept additional information electronically, the Program participant shall file the paper documentation with respect to the information at the appropriate filing location.

"(C) APPROPRIATE LOCATION.—For purposes of subparagraph (B), the 'appropriate location' is—

"(i) before January 1, 1999, a designated location; and

"(ii) after December 31, 1998—

"(I) if the paper documentation is required for release, a designated location; or

"(II) if the paper documentation is not required for release, a remote location designated by the Customs Service or a designated location.

"(D) OTHER.—A Program participant that is eligible under paragraph (1) to file additional information electronically from a remote location but chooses not to do so must file the paper documentation with respect to the information at a designated location.

"(c) POST-ENTRY SUMMARY INFORMATION.—A Program participant that is eligible to file electronically entry information under subsection (a) and additional information under subsection (b) from a remote location may file at any remote location designated by the Customs Service any information required by the Customs Service after entry summary.

"(d) DEFINITIONS.—As used in this section:

"(1) The term 'designated location' means a customs office located in the customs district designated by the entry filer for purposes of customs examination of the merchandise.

"(2) The term 'Program participant' means, with respect to an entry of merchandise, any party entitled to make the entry under section 484(a)(2)(B).".

SEC. 632. DRAWBACK AND REFUNDS.

(a) AMENDMENTS.—Section 313 (19 U.S.C. 1313) is amended as follows:

(1) Subsection (a) is amended—

(A) by inserting "or destruction under customs supervision" after "Upon the exportation";

(B) by inserting "provided that those articles have not been used prior to such exportation or destruction," after "manufactured or produced in the United States with the use of imported merchandise,";

(C) by inserting "or destruction" after "refunded upon the exportation"; and

(D) by striking out "wheat imported after ninety days after the date of the enactment of this Act" and inserting "imported wheat".

(2) Subsection (b) is amended—

(A) by striking out "duty-free or domestic merchandise" and inserting "any other merchandise (whether imported or domestic)";

(B) by inserting ", or destruction under customs supervision," after "there shall be allowed upon the exportation";

(C) by inserting "or destroyed" after "notwithstanding the fact that none of the imported merchandise may actually have been used in the manufacture or production of the exported";

(D) by inserting ", but only if those articles have not been used prior to such exportation or destruction" after "an amount of drawback equal to that which would have been allowable had the merchandise used therein been imported"; and

(E) by inserting "or destruction under customs supervision" after "but the total amount of drawback allowed upon the exportation".

(3) Subsection (c) is amended to read as follows:

"(c) MERCHANDISE NOT CONFORMING TO SAMPLE OR SPECIFICATIONS.—Upon the exportation, or destruction under the supervision of the Customs Service, of merchandise—

"(1) not conforming to sample or specifications, shipped without the consent of the consignee, or determined to be defective as of the time of importation;

"(2) upon which the duties have been paid;

"(3) which has been entered or withdrawn for consumption; and

"(4) which, within 3 years after release from the custody of the Customs Service, has been returned to the custody of the Customs Service for exportation or destruction under the supervision of the Customs Service;

the full amount of the duties paid upon such merchandise, less 1 percent, shall be refunded as drawback.".

(4) Subsection (j) is amended to read as follows:

"(j) UNUSED MERCHANDISE DRAWBACK.—

"(1) If imported merchandise, on which was paid any duty, tax, or fee imposed under Federal law because of its importation—

"(A) is, before the close of the 3-year period beginning on the date of importation—

"(i) exported, or

"(ii) destroyed under customs supervision; and

"(B) is not used within the United States before such exportation or destruction;

then upon such exportation or destruction 99 percent of the amount of each duty, tax, or fee so paid shall be refunded as drawback. The exporter (or destroyer) has the right to claim drawback under this paragraph, but may endorse such right to the importer or any intermediate party.

"(2) If there is, with respect to imported merchandise on which was paid any duty, tax, or fee imposed under Federal law because of its importation, any other merchandise (whether imported or domestic), that—

"(A) is commercially interchangeable with such imported merchandise;

"(B) is, before the close of the 3-year period beginning on the date of importation of the imported merchandise, either exported or destroyed under customs supervision; and

"(C) before such exportation or destruction—

"(i) is not used within the United States, and

"(ii) is in the possession of, including ownership while in bailment, in leased facilities, in transit to, or in any other manner under the operational control of, the party claiming drawback under this paragraph, if that party—

"(I) is the importer of the imported merchandise, or

"(II) received from the person who imported and paid any duty due on the imported merchandise a certificate of delivery transferring to the party the imported merchandise, commercially interchangeable merchandise, or any combination of imported and commercially interchangeable merchandise (and any such transferred merchandise, regardless of its origin, will be treated as the imported merchandise and any retained merchandise will be treated as domestic merchandise);

then upon the exportation or destruction of such other merchandise the amount of each such duty, tax, and fee paid regarding the imported merchandise shall be refunded as drawback, but in no case may the total drawback on the imported merchandise, whether available under this paragraph or any other provision of law or any combination thereof, exceed 99 percent of that duty, tax, or fee.

"(3) The performing of any operation or combination of operations (including, but not limited to, testing, cleaning, repacking, inspecting, sorting, refurbishing, freezing, blending, repairing, reworking, cutting, slitting, adjusting, replacing components, relabeling, disassembling, and unpacking), not amounting to manufacture or production for drawback purposes under the preceding provisions of this section on—

"(A) the imported merchandise itself in cases to which paragraph (1) applies, or

"(B) the commercially interchangeable merchandise in cases to which paragraph (2) applies,

shall not be treated as a use of that merchandise for purposes of applying paragraph (1)(B) or (2)(C).".

(5) Subsection (l) is amended by striking out "the fixing of a time limit within which drawback entries or entries for refund under any of the provisions of this section or section 309(b) shall be filed and completed," and inserting "the authority for the electronic submission of drawback entries".

(6) Subsection (p) is amended to read as follows:

"(p) SUBSTITUTION OF FINISHED PETROLEUM DERIVATIVES.—

"(1) IN GENERAL.—Notwithstanding any other provision of this section, if—

"(A) an article (hereafter referred to in this subsection as the 'exported article') of the same kind and quality as a qualified article is exported;

"(B) the requirements set forth in paragraph (2) are met; and

"(C) a drawback claim is filed regarding the exported article;

the amount of the duties paid on, or attributable to, such qualified article shall be refunded as drawback to the drawback claimant.

"(2) REQUIREMENTS.—The requirements referred to in paragraph (1) are as follows:

"(A) The exporter of the exported article—

"(i) manufactured or produced the qualified article in a quantity equal to or greater than the quantity of the exported article,

"(ii) purchased or exchanged, directly or indirectly, the qualified article from a manufacturer or producer described in subsection (a) or (b) in a quantity equal to or greater than the quantity of the exported article,

"(iii) imported the qualified article in a quantity equal to or greater than the quantity of the exported article, or

"(iv) purchased or exchanged, directly or indirectly, an imported qualified article from an importer in a quantity equal to or greater than the quantity of the exported article.

"(B) In the case of the requirement described in subparagraph (A)(ii), the manufacturer or producer produced the qualified article in a quantity equal to or greater than the quantity of the exported article.

"(C) In the case of the requirement of subparagraph (A)(i) or (A)(ii), the exported article is exported during the period that the qualified article described in subparagraph (A)(i) or (A)(ii) (whichever is applicable) is manufactured or produced, or within 180 days after the close of such period.

"(D) In the case of the requirement of subparagraph (A)(i) or (A)(ii), the specific petroleum refinery or production facility which made the qualified article concerned is identified.

"(E) In the case of the requirement of subparagraph (A)(iii) or (A)(iv), the exported article is exported within 180 days after the date of entry of an imported qualified article described in subparagraph (A)(iii) or (A)(iv) (whichever is applicable).

"(F) Except as otherwise specifically provided in this subsection, the drawback claimant complies with all requirements of this section, including providing certificates which establish the drawback eligibility of articles for which drawback is claimed.

"(G) The manufacturer, producer, importer, exporter, and drawback claimant of the qualified article and the exported article maintain all records required by regulation.

"(3) DEFINITION OF QUALIFIED ARTICLE, ETC.—For purposes of this subsection—

"(A) The term 'qualified article' means an article—

"(i) described in—

"(I) headings 2707, 2708, 2710, 2711, 2712, 2713, 2714, 2715, 2901, and 2902 of the Harmonized Tariff Schedule of the United States, or

"(II) headings 3901 through 3914 of such Schedule (as such headings apply to liquids, pastes, powders, granules, and flakes), and

"(ii) which is—

"(I) manufactured or produced as described in subsection (a) or (b) from crude petroleum or a petroleum derivative, or

"(II) imported duty-paid.

"(B) An exported article is of the same kind and quality as the qualified article for which it is substituted under this subsection if it is a product that is commercially interchangeable with or referred to under the same eight-digit classification of the Harmonized Tariff Schedule of the United States as the qualified article.

"(C) The term 'drawback claimant' means the exporter of the exported article or the refiner, producer, or importer of such article. Any person eligible to file a drawback claim under this subparagraph may designate another person to file such claim.

"(4) LIMITATION ON DRAWBACK.—The amount of drawback payable under this subsection shall not exceed the amount of drawback that would be attributable to the article—

"(A) manufactured or produced under subsection (a) or (b) by the manufacturer or producer described in clause (i) or (ii) of paragraph (2)(A), or

"(B) imported under clause (iii) or (iv) of paragraph (2)(A).".

(7) The following new subsections are inserted after subsection (p):

"(q) PACKAGING MATERIAL.—Packaging material, when used on or for articles or merchandise exported or destroyed under subsection (a), (b), (c), or (j), shall be eligible under such subsection for refund, as drawback, of 99 percent of any duty, tax, or fee imposed under Federal law on the importation of such material.

"(r) FILING DRAWBACK CLAIMS.—

"(1) A drawback entry and all documents necessary to complete a drawback claim, including those issued by the Customs Service, shall be filed or applied for, as applicable, within 3 years after the date of exportation or destruction of the articles on which drawback is claimed, except that any landing certificate required by regulation shall be filed within the time limit prescribed in such regulation. Claims not completed within the 3-year period shall be considered abandoned. No extension will be granted unless it is established that the Customs Service was responsible for the untimely filing.

"(2) A drawback entry for refund filed pursuant to any subsection of this section shall be deemed filed pursuant to any other subsection of this section should it be determined that drawback is not allowable under the entry as originally filed but is allowable under such other subsection.

"(s) DESIGNATION OF MERCHANDISE BY SUCCESSOR.—

"(1) For purposes of subsection (b), a drawback successor may designate imported merchandise used by the predecessor before the date of succession as the basis for drawback on articles manufactured by the drawback successor after the date of succession.

"(2) For purposes of subsection (j)(2), a drawback successor may designate—

"(A) imported merchandise which the predecessor, before the date of succession, imported; or

"(B) imported merchandise, commercially interchangeable merchandise, or any combination of imported and commercially interchangeable merchandise for which the successor received, before the date of succession, from the person who imported and paid any duty due on the imported merchandise a certificate of delivery transferring to the successor such merchandise;

as the basis for drawback on merchandise possessed by the drawback successor after the date of succession.

"(3) For purposes of this subsection, the term 'drawback successor' means an entity to which another entity (in this subsection referred to as the 'predecessor') has transferred by written agreement, merger, or corporate resolution—

"(A) all or substantially all of the rights, privileges, immunities, powers, duties, and liabilities of the predecessor; or

"(B) the assets and other business interests of a division, plant, or other business unit of such predecessor, but only if in such transfer the value of the transferred realty, personalty, and intangibles (other than drawback rights, inchoate or otherwise) exceeds the value of all transferred drawback rights, inchoate or otherwise.

"(4) No drawback shall be paid under this subsection until either the predecessor or the drawback successor (who shall also certify that it has the predecessor's records) certifies that—

"(A) the transferred merchandise was not and will not be claimed by the predecessor, and

"(B) the predecessor did not and will not issue any certificate to any other person that would enable that person to claim drawback.

"(t) DRAWBACK CERTIFICATES.—Any person who issues a certificate which would enable another person to claim drawback shall be subject to the recordkeeping provisions of this chapter, with the retention period beginning on the date that such certificate is issued.

"(u) ELIGIBILITY OF ENTERED OR WITHDRAWN MERCHANDISE.—Imported merchandise that has not been regularly entered or withdrawn for consumption shall not satisfy any requirement for use, exportation, or destruction under this section.

"(v) MULTIPLE DRAWBACK CLAIMS.—Merchandise that is exported or destroyed to satisfy any claim for drawback shall not be the basis of any other claim for drawback; except that appropriate credit and deductions for claims covering components or ingredients of such merchandise shall be made in computing drawback payments.".

(b) APPLICATION OF AMENDMENT TO FINISHED PETROLEUM DERIVATIVES.—Notwithstanding section 514 of the Tariff Act of 1930 (19 U.S.C. 1514) or any other provision of law, the amendment made by paragraph (6) of subsection (a) shall apply to—

(1) claims filed or liquidated on or after January 1, 1988, and

(2) claims that are unliquidated, under protest, or in litigation on the date of the enactment of this Act.

SEC. 633. EFFECTIVE DATE OF RATES OF DUTY.

Section 315 (19 U.S.C. 1315) is amended—

(1) by striking out "appropriate customs officer in the form and manner prescribed by regulations of the Secretary of the Treasury," in the first sentence of subsection (a) and inserting "Customs Service by written, electronic or such other means as the Secretary by regulation shall prescribe,";

(2) by striking out "customs custody" in the first sentence of subsection (b) and inserting "custody of the Customs Service"; and

(3) by striking out "paragraph 813" in subsection (c) and inserting "chapter 98 of the Harmonized Tariff Schedule of the United States".

SEC. 634. DEFINITIONS.

Section 401 (19 U.S.C. 1401) is amended—

(1) by amending subsection (k) to read as follows:

"(k) The term 'hovering vessel' means—

"(1) any vessel which is found or kept off the coast of the United States within or without the customs waters, if, from the history, conduct, character, or location of the vessel, it is reasonable to believe that such vessel is being used or may be used to introduce or promote or facilitate the introduction or attempted introduction of merchandise into the United States in violation of the laws of the United States; and

"(2) any vessel which has visited a vessel described in paragraph (1)."; and

(2) by inserting at the end thereof the following new subsections:

"(n) The term 'electronic transmission' means the transfer of data or information through an authorized electronic data interchange system consisting of, but not limited to, computer modems and computer networks.

"(o) The term 'electronic entry' means the electronic transmission to the Customs Service of—

"(1) entry information required for the entry of merchandise, and

"(2) entry summary information required for the classification and appraisement of the merchandise, the verification of statistical information, and the determination of compliance with applicable law.

"(p) The term 'electronic data interchange system' means any established mechanism approved by the Commissioner of Customs through which information can be transferred electronically.

"(q) The term 'National Customs Automation Program' means the program established under section 411.

"(r) The term 'import activity summary statement' refers to data or information transmitted electronically to the Customs Service, in accordance with such regulations as the Secretary prescribes, at the end of a specified period of time which enables the Customs Service to assess properly the duties, taxes and fees on merchandise imported during that period, collect accurate statistics and determine whether any other applicable requirement of law (other than a requirement relating to release from customs custody) is met.

"(s) The term 'reconciliation' means an electronic process, initiated at the request of an importer, under which the elements of an entry, other than those elements related to the admissibility of the merchandise, that are undetermined at the time of entry summary are provided to the Customs Service at a later time. A reconciliation is treated as an entry for purposes of liquidation, reliquidation, and protest.".

SEC. 635. MANIFESTS.

Section 431 (19 U.S.C. 1431) is amended—

(1) by amending subsections (a) and (b) to read as follows:

"(a) IN GENERAL.—Every vessel required to make entry under section 434 or obtain clearance under section 4197 of the Revised Statutes of the United States (46 U.S.C. App. 91) shall have a manifest that complies with the requirements prescribed under subsection (d).

"(b) PRODUCTION OF MANIFEST.—Any manifest required by the Customs Service shall be signed, produced, delivered or electronically transmitted by the master or person in charge of the vessel, aircraft, or vehicle, or by any other authorized agent of the owner or operator of the vessel, aircraft, or vehicle in accordance with the requirements prescribed under subsection (d). A manifest may be supplemented by bill of lading data supplied by the issuer of such bill. If any irregularity of omission or commission occurs in any way in respect to any manifest or bill of lading data, the owner or operator of the vessel, aircraft or vehicle, or any party responsible for such irregularity, shall be liable for any fine or penalty prescribed by law with respect to such irregularity. The Customs Service may take appropriate action against any of the parties."; and

(2) by inserting after subsection (c) the following new subsection:

"(d) REGULATIONS.—

"(1) IN GENERAL.—The Secretary shall by regulation—

"(A) specify the form for, and the information and data that must be contained in, the manifest required by subsection (a);

"(B) allow, at the option of the individual producing the manifest and subject to paragraph (2), letters and documents shipments to be accounted for by summary manifesting procedures;

"(C) prescribe the manner of production for, and the delivery for electronic transmittal of, the manifest required by subsection (a); and

"(D) prescribe the manner for supplementing manifests with bill of lading data under subsection (b).

"(2) LETTERS AND DOCUMENTS SHIPMENTS.—For purposes of paragraph (1)(B)—

"(A) the Customs Service may require with respect to letters and documents shipments—

"(i) that they be segregated by country of origin, and

"(ii) additional examination procedures that are not necessary for individually manifested shipments;

"(B) standard letter envelopes and standard document packs shall be segregated from larger document shipments for purposes of customs inspections; and

"(C) the term 'letters and documents' means—

"(i) data described in General Headnote 4(c) of the Harmonized Tariff Schedule of the United States,

"(ii) securities and similar evidences of value described in heading 4907 of such Schedule, but not monetary instruments defined pursuant to chapter 53 of title 31, United States Code, and

"(iii) personal correspondence, whether on paper, cards, photographs, tapes, or other media.".

SEC. 636. INVOICE CONTENTS.

Section 481 (19 U.S.C. 1481) is amended—

(1) by amending subsection (a)—

(A) by amending the matter preceding paragraph (1) to read as follows: "IN GENERAL.—All invoices of merchandise to be imported into the United States and any electronic equivalent thereof considered acceptable by the Secretary in regulations prescribed under this section shall set forth, in written, electronic, or such other form as the Secretary shall prescribe, the following:",

(B) by amending paragraph (3) to read as follows: "(3) A detailed description of the merchandise, including the commercial name by which each item is known, the grade or quality, and the marks, numbers, or symbols under which sold by the seller or manufacturer in the country of exportation, together with the marks and numbers of the packages in which the merchandise is packed;", and

(C) by amending paragraph (10) to read as follows: "(10) Any other fact that the Secretary may by regulation require as being necessary to a proper appraisement, examination and classification of the merchandise.";

(2) by amending subsection (c) to read as follows:

"(c) IMPORTER PROVISION OF INFORMATION.—Any information required to be set forth on an invoice may alternatively be provided by any of the parties qualifying as an 'importer of record' under section 484(a)(2)(B) by such means, in such form or manner, and within such time as the Secretary shall by regulation prescribe."; and

(3) by inserting before the period at the end of subsection (d) the following: "and may allow for the submission or electronic transmission of partial invoices, electronic equivalents of invoices, bills, or other documents or parts thereof, required under this section".

SEC. 637. ENTRY OF MERCHANDISE.

(a) AMENDMENTS TO SECTION 484.—Section 484 (19 U.S.C. 1484) is amended to read as follows:

"SEC. 484. ENTRY OF MERCHANDISE.

"(a) REQUIREMENT AND TIME.—

"(1) Except as provided in sections 490, 498, 552, 553, and 336(j), one of the parties qualifying as 'importer of record' under paragraph (2)(B), either in person or by an agent authorized by the party in writing, shall, using reasonable care—

"(A) make entry therefor by filing with the Customs Service—

"(i) such documentation or, pursuant to an electronic data interchange system, such information as is necessary to enable the Customs Service to determine whether the merchandise may be released from customs custody, and

"(ii) notification whether an import activity summary statement will be filed; and

"(B) complete the entry by filing with the Customs Service the declared value, classification and rate of duty applicable to the merchandise, and such other documentation or, pursuant to an electronic data interchange system, such other information as is necessary to enable the Customs Service to—

"(i) properly assess duties on the merchandise,

"(ii) collect accurate statistics with respect to the merchandise, and

"(iii) determine whether any other applicable requirement of law (other than a requirement relating to release from customs custody) is met.

"(2)(A) The documentation or information required under paragraph (1) with respect to any imported merchandise shall be filed or transmitted in such manner and within such time periods as the Secretary shall by regulation prescribe. Such regulations shall provide for the filing of import activity summary statements, covering entries or warehouse withdrawals made during a calendar month, within such time period as is prescribed in regulations but not to exceed the 20th day following such calendar month.

"(B) When an entry of merchandise is made under this section, the required documentation or information shall be filed or electronically transmitted either by the owner or purchaser of the merchandise or, when appropriately designated by the owner, purchaser, or consignee of the merchandise, a person holding a valid license under section 641. When a consignee declares on entry that he is the owner or purchaser of merchandise the Customs Service may, without liability, accept the declaration. For the purposes of this Act, the importer of record must be one of the parties who is eligible to file the documentation or information required by this section.

"(C) The Secretary, in prescribing regulations to carry out this subsection, shall establish procedures which insure the accuracy and timeliness of import statistics, particularly statistics relevant to the classification and valuation of imports. Corrections of errors in such statistical data shall be transmitted immediately to the Director of the Bureau of the Census, who shall make corrections in the statistics maintained by the Bureau. The Secretary shall also provide, to the maximum extent practicable, for the protection of the revenue, the enforcement of laws governing the importation and exportation of merchandise, the facilitation of the commerce of the United States, and the equal treatment of all importers of record of imported merchandise.

"(b) RECONCILIATION.—

"(1) IN GENERAL.—A party that electronically transmits an entry summary or import activity summary statement may at the time of filing such summary or statement notify the Customs Service of his intention to file a reconciliation pursuant to such regulations as the Secretary may prescribe. Such reconciliation must be filed by the importer of record within such time period as is prescribed by regulation but no later than 15 months following the filing of the entry summary or import activity summary statement; except that the prescribed time period for reconciliation issues relating to the assessment of antidumping and countervailing duties shall require filing no later than 90 days after the Customs Service advises the importer that a period of review for antidumping or countervailing duty purposes has been completed. Before filing a reconciliation, an importer of record shall post bond or other security pursuant to such regulations as the Secretary may prescribe.

"(2) REGULATIONS REGARDING AD/CV DUTIES.—The Secretary shall prescribe, in consultation with the Secretary of Commerce, such regulations as are necessary to adapt the reconciliation process for use in the collection of antidumping and countervailing duties.

"(c) RELEASE OF MERCHANDISE.—The Customs Service may permit the entry and release of merchandise from customs custody in accordance with such regulations as the Secretary may prescribe. No officer of the Customs Service shall be liable to any person with respect to the delivery of merchandise released from customs custody in accordance with such regulations.

"(d) SIGNING AND CONTENTS.—Entries shall be signed by the importer of record, or his agent, unless filed pursuant to an electronic data interchange system. If electronically filed, each transmission of data shall be certified by an importer of record or his agent, one of whom shall be resident in the United States for purposes of receiving service of process, as being true and correct to the best of his knowledge and belief, and such transmission shall be binding in the same manner and to the same extent as a signed document. The entry shall set forth such facts in regard to the importation as the Secretary may require and shall be accompanied by such invoices, bills of lading, certificates, and documents, or their electronically submitted equivalents, as are required by regulation.

"(e) PRODUCTION OF INVOICE.—The Secretary may provide by regulation for the production of an invoice, parts thereof, or the electronic equivalents thereof, in such manner and form, and under such terms and conditions, as the Secretary considers necessary.

"(f) STATISTICAL ENUMERATION.—The Secretary, the Secretary of Commerce, and the United States International Trade Commission shall establish from time to time for statistical purposes an enumeration of articles in such detail as in their judgment may be necessary, comprehending all merchandise imported into the United States and exported from the United States, and shall seek, in conjunction with statistical programs for domestic production and programs for achieving international harmonization of trade statistics, to establish the comparability thereof with such enumeration of articles. All import entries and export declarations shall include or have attached thereto an accurate statement specifying, in terms of such detailed enumeration, the kinds and quantities of all merchandise imported and exported and the value of the total quantity of each kind of article.

"(g) STATEMENT OF COST OF PRODUCTION.—Under such regulations as the Secretary may prescribe, the Customs Service may require a verified statement from the manufacturer or producer showing the cost of producing the imported merchandise, if the

Customs Service considers such verification necessary for the appraisement of such merchandise.

"(h) ADMISSIBILITY OF DATA ELECTRONICALLY TRANSMITTED.—Any entry or other information transmitted by means of an authorized electronic data interchange system shall be admissible in any and all administrative and judicial proceedings as evidence of such entry or information.".

(b) AMENDMENT TO SECTION 771.—Section 771 (19 U.S.C. 1677) is amended by adding at the end the following new paragraph:

"(23) ENTRY.—The term 'entry' includes, in appropriate circumstances as determined by the administering authority, a reconciliation entry created under a reconciliation process, defined in section 401(s), that is initiated by an importer. The liability of an importer under an antidumping or countervailing duty proceeding for entries of merchandise subject to the proceeding will attach to the corresponding reconciliation entry or entries. Suspension of liquidation of the reconciliation entry or entries, for the purpose of enforcing this title, is equivalent to the suspension of liquidation of the corresponding individual entries; but the suspension of liquidation of the reconciliation entry or entries for such purpose does not preclude liquidation for any other purpose.".

SEC. 638. APPRAISEMENT AND OTHER PROCEDURES.

Section 500 (19 U.S.C. 1500) is amended—

(1) by striking out "The appropriate customs officer" and inserting "The Customs Service";

(2) by striking out "appraise" in subsection (a) and inserting "fix the final appraisement of";

(3) by striking out "ascertain the" in subsection (b) and inserting "fix the final";

(4) by amending subsection (c)—

(A) by inserting "final" after "fix the", and

(B) by inserting ", taxes, and fees" after "duties" wherever it appears; and

(5) by amending subsections (d) and (e) to read as follows:

"(d) liquidate the entry and reconciliation, if any, of such merchandise; and

"(e) give or transmit, pursuant to an electronic data interchange system, notice of such liquidation to the importer, his consignee, or agent in such form and manner as the Secretary shall by regulation prescribe.".

SEC. 639. VOLUNTARY RELIQUIDATIONS.

Section 501 (19 U.S.C. 1501) is amended—

(1) by striking out "the appropriate customs officer on his own initiative" and inserting "the Customs Service";

(2) by inserting "or transmitted" after "given" wherever it appears; and

(3) by amending the section heading to read as follows:

"SEC. 501. VOLUNTARY RELIQUIDATIONS BY THE CUSTOMS SERVICE.".

SEC. 640. APPRAISEMENT REGULATIONS.

Section 502 (19 U.S.C. 1502) is amended—

(1) by amending subsection (a)—

(A) by inserting "(including regulations establishing procedures for the issuance of binding rulings prior to the entry of the merchandise concerned)" after "law",

(B) by striking out "ports of entry, and" and inserting "ports of entry. The Secretary",

(C) by inserting "or classifying" after "appraising" wherever it appears, and

(D) by striking out "such port" and inserting "any port, and may direct any customs officer at any port to review entries of merchandise filed at any other port"; and

(2) by striking out subsection (b) and redesignating subsection (c) as subsection (b).

SEC. 641. LIMITATION ON LIQUIDATION.

Section 504 (19 U.S.C. 1504) is amended—

(1) by amending subsection (a)—

(A) by striking out "Except as provided in subsection (b)," and inserting "Unless an entry is extended under subsection (b) or suspended as required by statute or court order,",

(B) by striking out "or" at the end of paragraph (2),

(C) by inserting "or" after the semicolon at the end of paragraph (3), and

(D) by inserting the following new paragraph after paragraph (3):

"(4) if a reconciliation is filed, or should have been filed, the date of the filing under section 484 or the date the reconciliation should have been filed;"; and

(2) by amending subsections (b), (c), and (d) to read as follows:

"(b) EXTENSION.—The Secretary may extend the period in which to liquidate an entry if—

"(1) the information needed for the proper appraisement or classification of the merchandise, or for insuring compliance with applicable law, is not available to the Customs Service; or

"(2) the importer of record requests such extension and shows good cause therefor.

The Secretary shall give notice of an extension under this subsection to the importer of record and the surety of such importer of record. Notice shall be in such form and manner (which may include electronic transmittal) as the Secretary shall by regulation prescribe. Any entry the liquidation of which is extended under this subsection shall be treated as having been liquidated at the rate of duty, value, quantity, and amount of duty asserted at the time of entry by the importer of record at the expiration of 4 years from the applicable date specified in subsection (a).

"(c) NOTICE OF SUSPENSION.—If the liquidation of any entry is suspended, the Secretary shall by regulation require that notice of the suspension be provided, in such manner as the Secretary considers appropriate, to the importer of record and to any authorized agent and surety of such importer of record.

"(d) REMOVAL OF SUSPENSION.—When a suspension required by statute or court order is removed, the Customs Service shall liquidate the entry within 6 months after receiving notice of the removal from the Department of Commerce, other agency, or a court with jurisdiction over the entry. Any entry not liquidated by the Customs Service within 6 months after receiving such notice shall be treated as having been liquidated at the rate of duty, value, quantity, and amount of duty asserted at the time of entry by the importer of record.”.

SEC. 642. PAYMENT OF DUTIES AND FEES.

(a) AMENDMENT TO SECTION 505.—Section 505 (19 U.S.C. 1505) is amended to read as follows:

“SEC. 505. PAYMENT OF DUTIES AND FEES.

“(a) DEPOSIT OF ESTIMATED DUTIES, FEES, AND INTEREST.—Unless merchandise is entered for warehouse or transportation, or under bond, the importer of record shall deposit with the Customs Service at the time of making entry, or at such later time as the Secretary may prescribe by regulation, the amount of duties and fees estimated to be payable thereon. Such regulations may provide that estimated duties and fees shall be deposited before or at the time an import activity summary statement is filed. If an import activity summary statement is filed, the estimated duties and fees shall be deposited together with interest, at a rate determined by the Secretary, accruing from the first date of the month the statement is required to be filed until the date such statement is actually filed.

“(b) COLLECTION OR REFUND OF DUTIES, FEES, AND INTEREST DUE UPON LIQUIDATION OR RELIQUIDATION.—The Customs Service shall collect any increased or additional duties and fees due, together with interest thereon, or refund any excess moneys deposited, together with interest thereon, as determined on a liquidation or reliquidation. Duties, fees, and interest determined to be due upon liquidation or reliquidation are due 30 days after issuance of the bill for such payment. Refunds of excess moneys deposited, together with interest thereon, shall be paid within 30 days of liquidation or reliquidation.

“(c) INTEREST.—Interest assessed due to an underpayment of duties, fees, or interest shall accrue, at a rate determined by the Secretary, from the date the importer of record is required to deposit estimated duties, fees, and interest to the date of liquidation or reliquidation of the applicable entry or reconciliation. Interest on excess moneys deposited shall accrue, at a rate determined by the Secretary, from the date the importer of record deposits estimated duties, fees, and interest to the date of liquidation or reliquidation of the applicable entry or reconciliation.

“(d) DELINQUENCY.—If duties, fees, and interest determined to be due or refunded are not paid in full within the 30-day period specified in subsection (b), any unpaid balance shall be considered delinquent and bear interest by 30-day periods, at a rate determined by the Secretary, from the date of liquidation or reliquidation until the full balance is paid. No interest shall accrue during the 30-day period in which payment is actually made.”.

(b) CONFORMING AMENDMENT.—Subsection (d) of section 520 (19 U.S.C. 1520(d)) is repealed.

SEC. 643. ABANDONMENT AND DAMAGE.

Section 506 (19 U.S.C. 1506) is amended—

(1) by striking out “the appropriate customs officer” and “such customs officer” wherever they appear and inserting “the Customs Service”;

(2) by amending paragraph (1)—

(A) by striking out “not sent to the appraiser’s stores for” and inserting “released without an”,

(B) by striking out "of the examination packages or quantities of merchandise",

(C) by striking out "the appraiser's stores" and inserting "the Customs Service", and

(D) by inserting "or entry" after "invoice", and

(3) by amending paragraph (2)—

(A) by inserting ", electronically or otherwise," after "files", and

(B) by striking out "written".

SEC. 644. CUSTOMS OFFICER'S IMMUNITY.

Section 513 (19 U.S.C. 1513) is amended to read as follows:

"SEC. 513. CUSTOMS OFFICER'S IMMUNITY.

"No customs officer shall be liable in any way to any person for or on account of—

"(1) any ruling or decision regarding the appraisement or the classification of any imported merchandise or regarding the duties, fees, and taxes charged thereon,

"(2) the collection of any dues, charges, duties, fees, and taxes on or on account of any imported merchandise, or

"(3) any other matter or thing as to which any person might under this Act be entitled to protest or appeal from the decision of such officer.".

SEC. 645. PROTESTS.

Section 514 (19 U.S.C. 1514) is amended—

(1) by amending subsection (a)—

(A) by striking out "appropriate customs officer" in the text preceding paragraph (1) and inserting "Customs Service",

(B) by inserting "or reconciliation as to the issues contained therein," after "entry," in paragraph (5),

(C) by striking out "and" and inserting "or" at the end of paragraph (6),

(D) by striking out the comma at the end of paragraph (7) and inserting a semicolon, and

(E) by striking out "appropriate customs officer, who" in the text following paragraph (7) and inserting "Customs Service, which";

(2) by amending subsection (b) by striking out "appropriate customs officer" and inserting "Customs Service";

(3) by amending the first sentence of subsection (c)(1) to read as follows: "A protest of a decision made under subsection (a) shall be filed in writing, or transmitted electronically pursuant to an electronic data interchange system, in accordance with regulations prescribed by the Secretary. A protest must set forth distinctly and specifically—

"(A) each decision described in subsection (a) as to which protest is made;

"(B) each category of merchandise affected by each decision set forth under paragraph (1);

"(C) the nature of each objection and the reasons therefor; and

"(D) any other matter required by the Secretary by regulation.";

(4) by redesignating paragraph (2) of subsection (c) as paragraph (3) and by striking out "such customs officer" in

such redesignated paragraph and inserting "the Customs Service";

(5) by designating the last sentence of paragraph (1) of subsection (c) as paragraph (2);

(6) by striking out "customs officer" in subsection (d) and inserting "Customs Service"; and

(7) by amending the section heading to read as follows:

"SEC. 514. PROTEST AGAINST DECISIONS OF THE CUSTOMS SERVICE.".

SEC. 646. REFUNDS AND ERRORS.

Section 520 (19 U.S.C. 1520) is amended—

(1) by inserting "or reconciliation" after "entry" in paragraphs (1) and (4) of subsection (a); and

(2) by amending subsection (c)—

(A) by striking out "appropriate customs officer" wherever it appears and inserting "Customs Service",

(B) by inserting "or reconciliation" after "reliquidate an entry", and

(C) by inserting ", whether or not resulting from or contained in electronic transmission," after "inadvertence" the first place it appears in paragraph (1).

SEC. 647. BONDS AND OTHER SECURITY.

Section 623 (19 U.S.C. 1623) is amended—

(1) by inserting "and the manner in which the bond may be filed with or, pursuant to an authorized electronic data interchange system, transmitted to the Customs Service" after "form of such bond" in subsection (b)(1); and

(2) by inserting at the end of subsection (d) the following new sentence: "Any bond transmitted to the Customs Service pursuant to an authorized electronic data interchange system shall have the same force and effect and be binding upon the parties thereto as if such bond were manually executed, signed, and filed.".

SEC. 648. CUSTOMHOUSE BROKERS.

Section 641 (19 U.S.C. 1641) is amended—

(1) by adding at the end of subsection (a)(2) the following new sentence: "It also includes the preparation of documents or forms in any format and the electronic transmission of documents, invoices, bills, or parts thereof, intended to be filed with the Customs Service in furtherance of such activities, whether or not signed or filed by the preparer, or activities relating to such preparation, but does not include the mere electronic transmission of data received for transmission to Customs.";

(2) by amending subsection (c)(1) to read as follows:

"(1) IN GENERAL.—Each person granted a customs broker's license under subsection (b) shall be issued, in accordance with such regulations as the Secretary shall prescribe, either or both of the following:

"(A) A national permit for the conduct of such customs business as the Secretary prescribes by regulation.

"(B) A permit for each customs district in which that person conducts customs business and, except as provided in paragraph (2), regularly employs at least 1 individual who is licensed under subsection (b)(2) to exercise responsible supervision and control over the customs business conducted by that person in that district.";

(3) by inserting at the end of subsection (c) the following new paragraph:

"(4) APPOINTMENT OF SUBAGENTS.—Notwithstanding subsection (c)(1), upon the implementation by the Secretary under section 413(b)(2) of the component of the National Customs Automation Program referred to in section 411(a)(2)(B), a licensed broker may appoint another licensed broker holding a permit in a customs district to act on its behalf as its subagent in that district if such activity relates to the filing of information that is permitted by law or regulation to be filed electronically. A licensed broker appointing a subagent pursuant to this paragraph shall remain liable for any and all obligations arising under bond and any and all duties, taxes, and fees, as well as any other liabilities imposed by law, and shall be precluded from delegating to a subagent such liability.";

(4) by amending subsection (d)(2)(B)—

(A) by striking out "appropriate customs officer" and inserting "Customs Service" in the first and third sentences,

(B) by striking out "he" and inserting "it" in the third sentence,

(C) by striking out "15 days" and inserting "30 days" in the third sentence,

(D) by striking out "the appropriate customs officer and the customs broker; they" and inserting "the Customs Service and the customs broker; which" in the sixth sentence,

(E) by striking out "his" and inserting "the" in the seventh sentence, and

(F) by striking out "for his decision" and inserting "for the decision" in the eighth sentence; and

(5) by amending subsection (f) by striking out "United States Customs Service." and inserting "Customs Service. The Secretary may not prohibit customs brokers from limiting their liability to other persons in the conduct of customs business. For purposes of this subsection or any other provision of this Act pertaining to recordkeeping, all data required to be retained by a customs broker may be kept on microfilm, optical disc, magnetic tapes, disks or drums, video files or any other electrically generated medium. Pursuant to such regulations as the Secretary shall prescribe, the conversion of data to such storage medium may be accomplished at any time subsequent to the relevant customs transaction and the data may be retained in a centralized basis according to such broker's business system.".

SEC. 649. CONFORMING AMENDMENTS.

(a) PLACE OF ENTRY AND UNLADING.—Section 447 (19 U.S.C. 1447) is amended by striking out "the appropriate customs officer shall consider" and inserting "the Customs Service considers".

(b) UNLADING.—Section 449 (19 U.S.C. 1449) is amended by striking out "appropriate customs officer of such port issues a permit for the unlading of such merchandise or baggage," and inserting "Customs Service issues a permit for the unlading of such merchandise or baggage at such port,".

Subtitle C—Miscellaneous Amendments to the Tariff Act of 1930

SEC. 651. ADMINISTRATIVE EXEMPTIONS.

Section 321 (19 U.S.C. 1321) is amended—

(1) by amending subsection (a)(1)—

(A) by striking out "of less than $10" and inserting "of an amount specified by the Secretary by regulation, but not less than $20,",

(B) by inserting ", fees," after "duties" wherever it appears, and

(C) by striking out "and" at the end thereof;

(2) by amending subsection (a)(2)—

(A) by striking out "shall not exceed—" and inserting "shall not exceed an amount specified by the Secretary by regulation, but not less than—",

(B) by striking out "$50" and "$100" in subparagraph (A) and inserting "$100" and "$200", respectively,

(C) by striking out "$25" in subparagraph (B) and inserting "$200",

(D) by striking out "$5" in subparagraph (C) and inserting "$200", and

(E) by striking the period at the end thereof and inserting "; and", and

(3) by inserting a new paragraph (3) at the end of subsection (a) to read as follows:

"(3) waive the collection of duties, fees, and taxes due on entered merchandise when such duties, fees, or taxes are less than $20 or such greater amount as may be specified by the Secretary by regulation."; and

(4) by amending subsection (b)—

(A) by striking out "to diminish any dollar amount specified in subsection (a) and"; and

(B) by striking out "such subsection" wherever it appears and inserting "subsection (a)".

SEC. 652. REPORT OF ARRIVAL.

Section 433 (19 U.S.C. 1433) is amended—

(1) by amending subsection (a)(1)—

(A) by striking out "or" at the end of subparagraph (B),

(B) by inserting "or" after the semicolon at the end of subparagraph (C), and

(C) by adding after subparagraph (C) the following:

"(D) any vessel which has visited a hovering vessel or received merchandise while outside the territorial sea;";

(2) by striking out "present to customs officers such" in subsection (d) and inserting "present, or transmit pursuant to an electronic data interchange system, to the Customs Service such information, data,"; and

(3) by amending subsection (e) to read as follows:

"(e) PROHIBITION ON DEPARTURES AND DISCHARGE.—Unless otherwise authorized by law, a vessel, aircraft or vehicle after arriving in the United States or Virgin Islands may, but only in accordance with regulations prescribed by the Secretary—

"(1) depart from the port, place, or airport of arrival; or

"(2) discharge any passenger or merchandise (including baggage).".

SEC. 653. ENTRY OF VESSELS.

Section 434 (19 U.S.C. 1434) is amended to read as follows:

"SEC. 434. ENTRY; VESSELS.

"(a) FORMAL ENTRY.—Within 24 hours (or such other period of time as may be provided under subsection (c)(2)) after the arrival at any port or place in the United States of—

"(1) any vessel from a foreign port or place;

"(2) any foreign vessel from a domestic port;

"(3) any vessel of the United States having on board bonded merchandise or foreign merchandise for which entry has not been made; or

"(4) any vessel which has visited a hovering vessel or has delivered or received merchandise while outside the territorial sea;

the master of the vessel shall, unless otherwise provided by law, make formal entry at the nearest customs facility or such other place as the Secretary may prescribe by regulation.

"(b) PRELIMINARY ENTRY.—The Secretary may by regulation permit the master to make preliminary entry of the vessel with the Customs Service in lieu of formal entry or before formal entry is made. In permitting preliminary entry, the Customs Service shall board a sufficient number of vessels to ensure compliance with the laws it enforces.

"(c) REGULATIONS.—The Secretary may by regulation—

"(1) prescribe the manner and format in which entry under subsection (a) or subsection (b), or both, must be made, and such regulations may provide that any such entry may be made electronically pursuant to an electronic data interchange system;

"(2) provide that—

"(A) formal entry must be made within a greater or lesser time than 24 hours after arrival, but in no case more than 48 hours after arrival, and

"(B) formal entry may be made before arrival; and

"(3) authorize the Customs Service to permit entry or preliminary entry of any vessel to be made at a place other than a designated port of entry, under such conditions as may be prescribed.".

SEC. 654. UNLAWFUL RETURN OF FOREIGN VESSEL PAPERS.

Section 438 (19 U.S.C. 1438) is amended—

(1) by striking out "section 435" and inserting "section 434";

(2) by inserting ", or regulations issued thereunder," after "of this Act"; and

(3) by striking out "the appropriate customs officer of the port where such vessel has been entered." and inserting "the Customs Service in the port in which such vessel has entered.".

SEC. 655. VESSELS NOT REQUIRED TO ENTER.

Section 441 (19 U.S.C. 1441) is amended—

(1) by amending the text preceding paragraph (1) to read as follows: "The following vessels shall not be required to make entry under section 434 or to obtain clearance under section

4197 of the Revised Statutes of the United States (46 U.S.C. App. 91):";

(2) by amending paragraph (3) to read as follows:

"(3) Any vessel carrying passengers on excursion from the United States Virgin Islands to the British Virgin Islands and returning, if—

"(A) the vessel does not in any way violate the customs or navigation laws of the United States;

"(B) the vessel has not visited any hovering vessel; and

"(C) the master of the vessel, if there is on board any article required by law to be entered, reports the article to the Customs Service immediately upon arrival.";

(3) by redesignating paragraphs (4) and (5) as paragraphs (5) and (6), respectively, and inserting after paragraph (3) the following:

"(4) Any United States documented vessel with recreational endorsement or any undocumented United States pleasure vessel not engaged in trade, if—

"(A) the vessel complies with the reporting requirements of section 433, and with the customs and navigation laws of the United States;

"(B) the vessel has not visited any hovering vessel; and

"(C) the master of, and any other person on board, the vessel, if the master or such person has on board any article required by law to be entered or declared, reports such article to the Customs Service immediately upon arrival;";

(4) by amending paragraph (6) (as so redesignated) by striking out "enrolled and licensed to engage in the foreign and coasting trade in the northern, northeastern, and northwestern frontiers" and inserting "documented under chapter 121 of title 46, United States Code, with a Great Lakes endorsement"; and

(5) by amending the section heading to read as follows:

"SEC. 441. EXCEPTIONS TO VESSEL ENTRY AND CLEARANCE REQUIREMENTS.".

SEC. 656. UNLADING.

Section 448(a) (19 U.S.C. 1448(a)) is amended—

(1) by amending the first sentence—

(A) by striking out "enter)" and inserting "enter or clear)",

(B) by striking out "or vehicle arriving from a foreign port or place" and inserting "required to make entry under section 434, or vehicle required to report arrival under section 433,",

(C) by inserting "or transmitted pursuant to an electronic data interchange system" after "issued", and

(D) by striking out the colon after "officer" and the proviso and inserting a period;

(2) by amending the second sentence—

(A) by striking out ", preliminary or otherwise,", and

(B) by inserting ", electronically pursuant to an authorized electronic data interchange system or otherwise," after "may issue a permit";

(3) by striking out the last sentence and inserting the following: "The owner or master of any vessel or vehicle, or agent thereof, shall notify the Customs Service of any merchan-

dise or baggage so unladen for which entry is not made within the time prescribed by law or regulation. The Secretary shall by regulation prescribe administrative penalties not to exceed $1,000 for each bill of lading for which notice is not given. Any such administrative penalty shall be subject to mitigation and remittance under section 618. Such unentered merchandise or baggage shall be the responsibility of the master or person in charge of the importing vessel or vehicle, or agent thereof, until it is removed from the carrier's control in accordance with section 490."; and

(4) by striking out "the appropriate customs officer" and "such customs officer" wherever they appear and inserting "the Customs Service".

SEC. 657. DECLARATIONS.

Section 485 (19 U.S.C. 1485) is amended—

(1) by amending subsection (a)—

(A) by inserting "or transmit electronically" after "file", and

(B) by inserting "and manner" after "form";

(2) by amending subsection (d)—

(A) by striking out "A importer" and inserting "An importer", and

(B) by striking out "a importer" and inserting "an importer"; and

(3) by inserting after subsection (f) the following new subsection:

"(g) EXPORTED MERCHANDISE RETURNED AS UNDELIVERABLE.—With respect to any importation of merchandise to which General Headnote 4(e) of the Harmonized Tariff Schedule of the United States applies, any person who gained any benefit from, or met any obligation to, the United States as a result of the prior exportation of such merchandise shall, in accordance with regulations prescribed by the Secretary, within a reasonable time inform the Customs Service of the return of the merchandise.".

SEC. 658. GENERAL ORDERS.

Section 490 (19 U.S.C. 1490) is amended—

(1) by amending subsection (a) to read as follows:

"(a) INCOMPLETE ENTRY.—

"(1) Whenever—

"(A) the entry of any imported merchandise is not made within the time provided by law or by regulation prescribed by the Secretary;

"(B) the entry of imported merchandise is incomplete because of failure to pay the estimated duties, fees, or interest;

"(C) in the opinion of the Customs Service, the entry of imported merchandise cannot be made for want of proper documents or other cause; or

"(D) the Customs Service believes that any merchandise is not correctly and legally invoiced;

the carrier (unless subject to subsection (c)) shall notify the bonded warehouse of such unentered merchandise.

"(2) After notification under paragraph (1), the bonded warehouse shall arrange for the transportation and storage of the merchandise at the risk and expense of the consignee. The merchandise shall remain in the bonded warehouse until—

"(A) entry is made or completed and the proper documents are produced;

"(B) the information and data necessary for entry are transmitted to the Customs Service pursuant to an authorized electronic data interchange system; or

"(C) a bond is given for the production of documents or the transmittal of data.";

(2) by amending subsection (b)—

(A) by amending the heading for subsection (b) to read as follows:

"(b) REQUEST FOR POSSESSION BY CUSTOMS.—", and

(B) by striking out "appropriate customs officer" and inserting "Customs Service"; and

(3) by adding at the end the following new subsection:

"(c) GOVERNMENT MERCHANDISE.—Any imported merchandise that—

"(1) is described in any of paragraphs (1) through (4) of subsection (a); and

"(2) is consigned to, or owned by, the United States Government;

shall be stored and disposed of in accordance with such rules and procedures as the Secretary shall by regulation prescribe.".

SEC. 659. UNCLAIMED MERCHANDISE.

Section 491 (19 U.S.C. 1491) is amended—

(1) by amending subsection (a)—

(A) by striking out "customs custody for one year" in the first sentence and inserting "in a bonded warehouse pursuant to section 490 for 6 months",

(B) by striking out "public store or bonded warehouse for a period of one year" in the second sentence and inserting "pursuant to section 490 in a bonded warehouse for 6 months",

(C) by striking out "estimated duties and storage" in the first sentence and inserting "estimated duties, taxes, fees, interest, storage,",

(D) by inserting "taxes, fees, interest," after "duties," wherever it appears, and

(E) by striking out "duties" in the last sentence and inserting "duties, taxes, interest, and fees"; and

(2) by redesignating subsection (b) as subsection (e) and inserting after subsection (a) the following new subsections:

"(b) NOTICE OF TITLE VESTING IN THE UNITED STATES.—At the end of the 6-month period referred to in subsection (a), the Customs Service may, in lieu of sale of the merchandise, provide notice to all known interested parties that the title to such merchandise shall be considered to vest in the United States free and clear of any liens or encumbrances, on the 30th day after the date of the notice unless, before such 30th day—

"(1) the subject merchandise is entered or withdrawn for consumption; and

"(2) payment is made of all duties, taxes, fees, transfer and storage charges, and other expenses that may have accrued thereon.

"(c) RETENTION, TRANSFER, DESTRUCTION, OR OTHER DISPOSITION.—If title to any merchandise vests in the United States by operation of subsection (b), such merchandise may be retained by the Customs Service for official use, transferred to any other Federal agency or to any State or local agency, destroyed, or otherwise disposed of in accordance with such regulations as the Secretary shall prescribe. All transfer and storage charges or expenses accruing on retained or transferred merchandise shall be paid by the receiving agency.

"(d) PETITION.—Whenever any party, having lost a substantial interest in merchandise by virtue of title vesting in the United States under subsection (b), can establish such title or interest to the satisfaction of the Secretary within 30 days after the day on which title vests in the United States under subsection (b), or can establish to the satisfaction of the Secretary that the party did not receive notice under subsection (b), the Secretary may, upon receipt of a timely and proper petition and upon finding that the facts and circumstances warrant, pay such party out of the Treasury of the United States the amount the Secretary believes the party would have received under section 493 had the merchandise been sold and a proper claim filed. The decision of the Secretary with respect to any such petition is final and conclusive on all parties."; and

(3) by amending subsection (e) (as so redesignated) by striking out "appropriate customs officer" in paragraph (3) and inserting "Customs Service".

SEC. 660. DESTRUCTION OF MERCHANDISE.

Section 492 (19 U.S.C. 1492) is amended—

(1) by inserting ", retained for official use, or otherwise disposed of" after "destroyed"; and

(2) by striking out "appropriate customs officer" and inserting "Customs Service".

SEC. 661. PROCEEDS OF SALE.

Section 493 (19 U.S.C. 1493) is amended—

(1) by inserting "taxes, and fees," after "duties,";

(2) by striking out "by the appropriate customs officer"; and

(3) by striking out "such customs officer" and inserting "the Customs Service".

SEC. 662. ENTRY UNDER REGULATIONS.

Section 498(a) (19 U.S.C. 1498(a)) is amended—

(1) by amending paragraph (1) to read as follows:

"(1) Merchandise, when—

"(A) the aggregate value of the shipment does not exceed an amount specified by the Secretary by regulation, but not more than $2,500; or

"(B) different commercial facilitation and risk considerations that may vary for different classes or kinds of merchandise or different classes of transactions may dictate;"; and

(2) by striking out "$10,000" in paragraph (2) and inserting "such amounts as the Secretary may prescribe".

SEC. 663. AMERICAN TRADEMARKS.

Section 526(e)(3) (19 U.S.C. 1526(e)(3)) is amended—

(1) by striking out "1 year" and inserting "90 days"; and

(2) by striking out "appropriate customs officers" and inserting "the Customs Service".

SEC. 664. SIMPLIFIED RECORDKEEPING FOR MERCHANDISE TRANSPORTED BY PIPELINE.

Part IV of title IV is amended by inserting after section 553 the following new section:

"SEC. 553A. RECORDKEEPING FOR MERCHANDISE TRANSPORTED BY PIPELINE.

"Merchandise in Customs custody that is transported by pipeline may be accounted for on a quantitative basis, based on the bill of lading, or equivalent document of receipt, issued by the pipeline carrier. Unless the Customs Service has reasonable cause to suspect fraud, the Customs Service may accept the bill of lading, or equivalent document of receipt, issued by the pipeline carrier to the shipper and accepted by the consignee to maintain identity. The shipper, pipeline operator, and consignee shall be subject to the recordkeeping requirements of sections 508 and 509.".

SEC. 665. ENTRY FOR WAREHOUSE.

Section 557(a) (19 U.S.C. 1557(a)) is amended—

(1) by designating the first 2 sentences of such subsection as paragraph (1);

(2) by striking out in such paragraph (1) (as so designated) ": *Provided*, That the total period of time for which such merchandise may remain in bonded warehouse shall not exceed 5 years from the date of importation." and inserting the following: "; except that—

"(A) the total period of time for which such merchandise may remain in bonded warehouse shall not exceed 5 years from the date of importation; and

"(B) turbine fuel may be withdrawn for use under section 309 without the payment of duty if an amount equal to the quantity of fuel withdrawn is shown to be used within 30 days after the day of withdrawal, but duties (together with interest payable from the date of the withdrawal at the rate of interest established under section 6621 of title 26, United States Code) shall be deposited by the 40th day after the day of withdrawal on fuel that was withdrawn in excess of the quantity shown to have been so used during such 30-day period."; and

(3) by designating the remaining sentences of such subsection as paragraph (2).

SEC. 666. CARTAGE.

The first sentence of section 565 (19 U.S.C. 1565) is amended to read as follows: "The cartage of merchandise entered for warehouse shall be done by—

"(1) cartmen appointed and licensed by the Customs Service; or

"(2) carriers designated under section 551 to carry bonded merchandise;

who shall give bond, in a penal sum to be fixed by the Customs Service, for the protection of the Government against any loss of, or damage to, the merchandise while being so carted.".

SEC. 667. SEIZURE.

Section 612 (19 U.S.C. 1612) is amended—

(1) by amending subsection (a)—

(A) by striking out "the appropriate customs officer", "such officer" and "the customs officer" wherever they appear and inserting "the Customs Service", and

(B) by striking out "the appraiser's return and his" and inserting "its"; and

(2) by amending subsection (b) to read as follows:

"(b) If the Customs Service determines that the expense of keeping the vessel, vehicle, aircraft, merchandise, or baggage is disproportionate to the value thereof, the Customs Service may promptly order the destruction or other appropriate disposition of such property under regulations prescribed by the Secretary. No customs officer shall be liable for the destruction or other disposition of property made pursuant to this section.".

SEC. 668. LIMITATION ON ACTIONS.

Section 621 (19 U.S.C. 1621) is amended—

(1) by inserting "any duty under section 592(d), 593A(d), or" before "any pecuniary penalty"; and

(2) by striking out "discovered:" and all that follows thereafter and inserting the following: "discovered; except that—

"(1) in the case of an alleged violation of section 592 or 593A, no suit or action (including a suit or action for restoration of lawful duties under subsection (d) of such sections) may be instituted unless commenced within 5 years after the date of the alleged violation or, if such violation arises out of fraud, within 5 years after the date of discovery of fraud, and

"(2) the time of the absence from the United States of the person subject to the penalty or forfeiture, or of any concealment or absence of the property, shall not be reckoned within the 5-year period of limitation.".

SEC. 669. COLLECTION OF FEES ON BEHALF OF OTHER AGENCIES.

The Tariff Act of 1930 is amended by inserting after section 528 the following new section:

"SEC. 529. COLLECTION OF FEES ON BEHALF OF OTHER AGENCIES.

"The Customs Service shall be reimbursed from the fees collected for the cost and expense, administrative and otherwise, incurred in collecting any fees on behalf of any government agency for any reason.".

SEC. 670. AUTHORITY TO SETTLE CLAIMS.

The Tariff Act of 1930 is amended by inserting after section 629 the following new section:

"SEC. 630. AUTHORITY TO SETTLE CLAIMS.

"(a) IN GENERAL.—With respect to a claim that cannot be settled under chapter 171 of title 28, United States Code, the Secretary may settle, for not more than $50,000 in any one case, a claim for damage to, or loss of, privately owned property caused by an investigative or law enforcement officer (as defined in section 2680(h) of title 28, United States Code) who is employed by the Customs Service and acting within the scope of his or her employment.

"(b) LIMITATIONS.—The Secretary may not pay a claim under subsection (a) that—

"(1) concerns commercial property;

"(2) is presented to the Secretary more than 1 year after it occurs; or

"(3) is presented by an officer or employee of the United States Government and arose within the scope of employment.

"(c) FINAL SETTLEMENT.—A claim may be paid under this section only if the claimant accepts the amount of settlement in complete satisfaction of the claim.".

SEC. 671. USE OF PRIVATE COLLECTION AGENCIES.

The Tariff Act of 1930 is amended by inserting after section 630 the following new section:

"SEC. 631. USE OF PRIVATE COLLECTION AGENCIES.

"(a) IN GENERAL.—Notwithstanding any other provision of law, the Secretary, under such terms and conditions as the Secretary considers appropriate, shall enter into contracts and incur obligations with one or more persons for collection services to recover indebtedness arising under the customs laws and owed the United States Government, but only after the Customs Service has exhausted all administrative efforts, including all claims against applicable surety bonds, to collect the indebtedness.

"(b) CONTRACT REQUIREMENTS.—Any contract entered into under subsection (a) shall provide that—

"(1) the Secretary retains the authority to resolve a dispute, compromise a claim, end collection action, and refer a matter to the Attorney General to bring a civil action; and

"(2) the person is subject to—

"(A) section 552a of title 5, United States Code, to the extent provided in subsection (m) of such section; and

"(B) laws and regulations of the United States Government and State governments related to debt collection practices.".

Subtitle D—Miscellaneous Provisions and Consequential and Conforming Amendments to Other Laws

SEC. 681. AMENDMENTS TO THE HARMONIZED TARIFF SCHEDULE.

(a) RETURN SHIPMENTS.—General Note 4 of the Harmonized Tariff Schedule of the United States is amended—

(1) by striking out "and" at the end of subdivision (c);

(2) by inserting "and" after "1930," in subdivision (d);

(3) by inserting after subdivision (d) the following:

"(e) articles exported from the United States which are returned within 45 days after such exportation from the United States as undeliverable and which have not left the custody of the carrier or foreign customs service,"; and

(4) by adding at the end the following new sentence: "No exportation referred to in subdivision (e) may be treated as satisfying any requirement for exportation in order to receive a benefit from, or meet an obligation to, the United States as a result of such exportation.".

(b) ENTRY NOT REQUIRED FOR LOCOMOTIVES AND RAILWAY FREIGHT CARS.—

(1) The Notes to chapter 86 of such Schedule are amended by inserting after note 3 the following new note:

"4. Railway locomotives (provided for in headings 8601 and 8602) and railway freight cars (provided for in heading 8606) on which no duty is owed are not subject to the entry or release requirements for imported merchandise set forth in sections 448 and 484 of the Tariff Act of 1930. The Secretary of the Treasury may by regulation establish appropriate reporting requirements, including the requirement that a bond be posted to ensure compliance.".

(2) The U.S. Notes to subchapter V of chapter 99 of such Schedule are amended by inserting after note 8 the following new note:

"9. Railway freight cars provided for in subheadings 9905.86.05 and 9905.86.10 are not subject to the entry or release requirements for imported merchandise set forth in sections 448 and 484 of the Tariff Act of 1930. The Secretary of the Treasury may by regulation establish appropriate reporting requirements, including the requirement that a bond be posted to ensure compliance.".

(c) INSTRUMENTS OF INTERNATIONAL TRAFFIC.—The U.S. Notes to subchapter III of chapter 98 of such Schedule is amended by inserting after note 3 the following new note:

"4. Instruments of international traffic, such as containers, lift vans, rail cars and locomotives, truck cabs and trailers, etc. are exempt from formal entry procedures but are required to be accounted for when imported and exported into and out of the United States, respectively, through the manifesting procedures required for all international carriers by the United States Customs Service. Fees associated with the importation of such instruments of international traffic shall be reported and paid on a periodic basis as required by regulations issued by the Secretary of the Treasury and in accordance with 1956 Customs Convention on Containers (20 UST 30; TIAS 6634).".

SEC. 682. CUSTOMS PERSONNEL AIRPORT WORK SHIFT REGULATION.

Section 13031(g) of the Consolidated Omnibus Budget Reconciliation Act of 1985 (19 U.S.C. 58c(g)) is amended—

(1) by striking out "In addition to the regulations required under paragraph (2), the" and inserting "The";

(2) by striking out paragraph (2); and

(3) by redesignating paragraph (3) as paragraph (2).

SEC. 683. USE OF HARBOR MAINTENANCE TRUST FUND AMOUNTS FOR ADMINISTRATIVE EXPENSES.

(a) IN GENERAL.—Paragraph (3) of section 9505(c) of the Internal Revenue Code of 1986 (relating to expenditures from Harbor Maintenance Trust Fund) is amended to read as follows:

"(3) for the payment of all expenses of administration incurred by the Department of the Treasury, the Army Corps of Engineers, and the Department of Commerce related to the administration of subchapter A of chapter 36 (relating to harbor maintenance tax), but not in excess of $5,000,000 for any fiscal year.".

(b) EFFECTIVE DATE.—The amendment made by subsection (a) shall apply to fiscal years beginning after the date of the enactment of this Act.

SEC. 684. AMENDMENTS TO TITLE 28, UNITED STATES CODE.

(a) AMENDMENTS RELATING TO ACCREDITATION OF PRIVATE LABORATORIES.—Title 28 of the United States Code is amended as follows:

(1) Section 1581(g) is amended by—

(A) striking out "and" at the end of paragraph (1);

(B) by striking out the period at the end of paragraph (2) and inserting "; and"; and

(C) by adding at the end the following:

"(3) any decision or order of the Customs Service to deny, suspend, or revoke accreditation of a private laboratory under section 499(b) of the Tariff Act of 1930.".

(2) Section 2631(g) is amended by inserting at the end the following new paragraph:

"(3) A civil action to review any decision or order of the Customs Service to deny, suspend, or revoke accreditation of a private laboratory under section 499(b) of the Tariff Act of 1930 may be commenced in the Court of International Trade by the person whose accreditation was denied, suspended, or revoked.".

(3) Section 2636 is amended—

(A) by redesignating subsection (h) as subsection (i); and

(B) by inserting after subsection (g) the following new subsection:

"(h) A civil action contesting the denial, suspension, or revocation by the Customs Service of a private laboratory's accreditation under section 499(b) of the Tariff Act of 1930 is barred unless commenced in accordance with the rules of the Court of International Trade within 60 days after the date of the decision or order of the Customs Service.".

(4) Section 2640 is amended—

(A) by redesignating subsection (d) as subsection (e); and

(B) by inserting after subsection (c) the following new subsection:

"(d) In any civil action commenced to review any order or decision of the Customs Service under section 499(b) of the Tariff Act of 1930, the court shall review the action on the basis of the record before the Customs Service at the time of issuing such decision or order.".

(5) Section 2642 is amended by inserting before the period the following: "or laboratories accredited by the Customs Service under section 499(b) of the Tariff Act of 1930".

(b) APPLICATION OF SUBSECTION (a) AMENDMENTS.—For purposes of applying the amendments made by subsection (a), any decision or order of the Customs Service denying, suspending, or revoking the accreditation of a private laboratory on or after the date of the enactment of this Act and before regulations to implement section 499(b) of the Tariff Act of 1930 are issued shall be treated as having been denied, suspended, or revoked under such section 499(b).

(c) JURISDICTION OF COURT.—Section 1582(1) of title 28, United States Code, is amended by inserting "593A," after "592,".

(d) FILING OF OFFICIAL DOCUMENTS.—Section 2635(a) of title 28, United States Code, is amended to read as follows:

"(a) In any action commenced in the Court of International Trade contesting the denial of a protest under section 515 of the

Tariff Act of 1930 or the denial of a petition under section 516 of such Act, the Customs Service, as prescribed by the rules of the court, shall file with the clerk of the court, as part of the official record, any document, paper, information or data relating to the entry of merchandise and the administrative determination that is the subject of the protest or petition.".

SEC. 685. TREASURY FORFEITURE FUND.

Section 9703 of title 31, United States Code (as added by Public Law 102–393), is amended—

(1) by redesignating subparagraphs (E), (F), (G), (H), and (I) of subsection (a)(2) as subparagraphs (F), (G), (H), (I), and (J), respectively;

(2) by inserting after subparagraph (D) of subsection (a)(2) the following new subparagraph:

"(E) the payment of claims against employees of the Customs Service settled by the Secretary under section 630 of the Tariff Act of 1930;"; and

(3) by striking out "shall" the first place it appears in subsection (e) and inserting "may".

SEC. 686. AMENDMENTS TO THE REVISED STATUTES OF THE UNITED STATES.

(a) TECHNICAL AMENDMENTS.—The Revised Statutes of the United States are amended as follows:

(1) Section 2793 (19 U.S.C. 288, 46 U.S.C. App. 111, 123) is amended—

(A) by striking out "Enrolled or licensed vessels engaged in the foreign and coasting trade on the northern, northeastern, and northwestern frontiers of the United States," and inserting "Documented vessels with a coastwise, Great Lakes endorsement,"; and

(B) by striking out the first semicolon and all the text that follows thereafter and inserting a period.

(2) Section 3126 (19 U.S.C. 293) is amended—

(A) by striking out "Any vessel, on being duly registered in pursuance of the laws of the United States," and inserting "Any United States documented vessel with a registry or coastwise endorsement, or both" and

(B) by striking out all the text occurring after the first sentence.

(3) Section 3127 (19 U.S.C. 294) is amended by striking out "in registered vessels" and inserting "a United States documented vessel with a registry or coastwise endorsement, or both,".

(4) Section 4136 (46 U.S.C. App. 14) is amended by striking out—

(A) "The Secretary of Commerce may issue a register or enrollment" and inserting "The Secretary of Transportation may issue a certificate of documentation with a coastwise endorsement"; and

(B) "Secretary of Commerce," and inserting "Secretary of Transportation,".

(5) Section 4336 (46 U.S.C. App. 277) is amended—

(A) by striking out "register or enrollment or license of any vessel" and inserting "certificate of documentation of any documented vessel"; and

(B) by striking out "Secretary of the Treasury is not required to have its register or enrollment or license" and inserting "Secretary of Transportation is not required to have its certificate of documentation".

(b) CLEARANCE REQUIREMENTS.—Section 4197 of such Revised Statutes (46 U.S.C. App. 91) is amended to read as follows:

"SEC. 4197. CLEARANCE; VESSELS.

"(a) WHEN REQUIRED; VESSELS OF THE UNITED STATES.—Except as otherwise provided by law, any vessel of the United States shall obtain clearance from the Customs Service before proceeding from a port or place in the United States—

"(1) for a foreign port or place;

"(2) for another port or place in the United States if the vessel has on board bonded merchandise or foreign merchandise for which entry has not been made; or

"(3) outside the territorial sea to visit a hovering vessel or to receive merchandise while outside the territorial sea.

"(b) WHEN REQUIRED; OTHER VESSELS.—Except as otherwise provided by law, any vessel that is not a vessel of the United States shall obtain clearance from the Customs Service before proceeding from a port or place in the United States—

"(1) for a foreign port or place;

"(2) for another port or place in the United States; or

"(3) outside the territorial sea to visit a hovering vessel or to receive or deliver merchandise while outside the territorial sea.

"(c) REGULATIONS.—The Secretary of the Treasury may by regulation—

"(1) prescribe the manner in which clearance under this section is to be obtained, including the documents, data or information which shall be submitted or transmitted, pursuant to an authorized data interchange system, to obtain the clearance;

"(2) permit the Customs Service to grant clearance for a vessel under this section before all requirements for clearance are complied with, but only if the owner or operator of the vessel files a bond in an amount set by the Secretary of the Treasury conditioned upon the compliance by the owner or operator with all specified requirements for clearance within a time period (not exceeding 4 business days) established by the Secretary of the Treasury; and

"(3) authorize the Customs Service to permit clearance of any vessel to be obtained at a place other than a designated port of entry, under such conditions as he may prescribe.".

SEC. 687. AMENDMENTS TO TITLE 18, UNITED STATES CODE.

Section 965(a) of title 18, United States Code, is amended—

(1) by striking out "sections 91, 92, and 94 of Title 46" and inserting "section 431 of the Tariff Act of 1930 (19 U.S.C. 1431) and section 4197 of the Revised Statutes of the United States (46 U.S.C. App. 91),";

(2) by striking out "the collector of customs for the district wherein such vessel is then located" and inserting "the Customs Service"; and

(3) by striking out "the collector like" and inserting in lieu thereof "the Customs Service like".

SEC. 688. AMENDMENT TO THE ACT TO PREVENT POLLUTION FROM SHIPS.

Section 9(e) of the Act to Prevent Pollution from Ships (94 Stat. 2301, 33 U.S.C. 1908(e)) is amended by striking out "shall refuse or revoke" and all of the text following thereafter and inserting "shall refuse or revoke the clearance required by section 4197 of the Revised Statutes of the United States (46 U.S.C. App. 91). Clearance may be granted upon the filing of a bond or other surety satisfactory to the Secretary.".

SEC. 689. MISCELLANEOUS TECHNICAL AMENDMENTS.

(a) ACT OF OCTOBER 3, 1913.—The Act of October 3, 1913, is amended—

(1) in section IV, J, subsection 1 (19 U.S.C. 128) by striking out "registered as a vessel of the United States," and inserting "documented under chapter 121 of title 46, United States Code,"; and

(2) in section IV, J, subsection 3 (19 U.S.C. 131)—

(A) by striking out "vessels of the United States" and inserting "United States documented vessels"; and

(B) by striking out "registered as a vessel of the United States." and inserting "documented under chapter 121 of title 46, United States Code.".

(b) ACT OF AUGUST 5, 1935.—Section 4 of the Act of August 5, 1935 (19 U.S.C. 1704) is amended—

(1) by striking out "whenever the collector of customs of the district in which any vessel is, or is sought to be, registered, enrolled, licensed, or numbered," and inserting "when the Secretary of Transportation";

(2) by striking out "such collector" and inserting "the Secretary of Transportation";

(3) by striking out "said collector shall revoke the registry, enrollment, license, or number of such vessel" and inserting "the Secretary of Transportation shall revoke any endorsement on the vessel's certificate of documentation or number (when the Secretary is the authority issuing the number under chapter 123 of title 46, United States Code)"; and

(4) by striking out "Such collector and all persons" and inserting "The Secretary of Transportation and all persons".

(c) ACT OF NOVEMBER 6, 1966.—Sections 2(e) and 3(e) of the Act of November 6, 1966 (46 U.S.C. App. 817d(e) and 817e(e)) are each amended—

(1) by striking out "The collector of customs at" and inserting "At"; and

(2) by inserting ", the Customs Service" after "subsection (a) of this section".

SEC. 690. REPEAL OF OBSOLETE PROVISIONS OF LAW.

(a) REVISED STATUTES.—The following provisions of the Revised Statutes of the United States are repealed:

(1) So much of section 2792 as is codified at 19 U.S.C. 289 and 46 U.S.C. App. 110 and 112 (as in effect on the date of the enactment of this Act).

(2) Section 3111 (19 U.S.C. 282).

(3) Section 3118 (19 U.S.C. 286).

(4) Section 3119 (19 U.S.C. 287).

(5) Section 3122 (19 U.S.C. 290).

(6) Section 3124 (19 U.S.C. 291).
(7) Section 3125 (19 U.S.C. 292).
(8) Section 4198 (46 U.S.C. App. 94).
(9) Section 4199 (46 U.S.C. App. 93).
(10) Section 4201 (46 U.S.C. App. 96).
(11) Section 4207.
(12) Section 4208 (46 U.S.C. App. 102).
(13) Section 4213 (46 U.S.C. App. 101).
(14) So much of section 4221 as is codified at 46 U.S.C. App. 113 (as in effect on the date of the enactment of this Act).
(15) Section 4222 (46 U.S.C. App. 126).
(16) Sections 4306, 4307, and 4308 (46 U.S.C. App. 351 through 353).
(17) Section 4332 (46 U.S.C. App. 274).
(18) Section 4348 (46 U.S.C. App. 293).
(19) Section 4358 (46 U.S.C. App. 306).
(20) Section 4361 (46 U.S.C. App. 307).
(21) Sections 4362 through 4369 (46 U.S.C. App. 308 through 315).
(22) Sections 4573 through 4576 (46 U.S.C. App. 674 through 677).

(b) TARIFF ACT OF 1930.—The following sections of the Tariff Act of 1930 are repealed:
(1) Section 432 (19 U.S.C. 1432).
(2) Section 435 (19 U.S.C. 1435).
(3) Section 437 (19 U.S.C. 1437).
(4) Section 439 (19 U.S.C. 1439).
(5) Section 440 (19 U.S.C. 1440).
(6) Sections 443, 444, and 445 (19 U.S.C. 1443, 1444, and 1445).
(7) Section 465 (19 U.S.C. 1465).
(8) Section 482 (19 U.S.C. 1482).
(9) Section 583 (19 U.S.C. 1583).
(10) Section 585 (19 U.S.C. 1585).

(c) MISCELLANEOUS PROVISIONS.—The following provisions are repealed:
(1) Section 1 of the Act of February 10, 1900 (46 U.S.C. App. 131).
(2) Section 2 of the Act of April 29, 1908 (46 U.S.C. App. 127).
(3) Section 1 of the Act of July 1, 1916 (46 U.S.C. App. 130).
(4) Sections 1 and 2 of the Act of July 3, 1926 (46 U.S.C. App. 293a and 293b).
(5) The last undesignated paragraph of section 201 of the Act of August 5, 1935 (19 U.S.C. 1432a), is repealed.
(6) The Act of June 16, 1937 (19 U.S.C. 1435b).
(7) The Act of May 4, 1934 (46 U.S.C. App. 91a).
(8) Section 1403(b) of the Water Resources Development Act of 1986 (Public Law 99–662; 26 U.S.C. 4461 note).

SEC. 691. REPORTS TO CONGRESS.

(a) ANTIDUMPING AND COUNTERVAILING DUTY COLLECTIONS.—The Commissioner of Customs shall before the 60th day of each fiscal year after fiscal year 1994 submit to Congress a report regarding the collection during the preceding fiscal year of duties imposed under the antidumping and countervailing duty laws.

(b) CES FEE REPORT.—

(1) AMENDMENT.—Section 9501(c) of the Omnibus Budget Reconciliation Act of 1987 (19 U.S.C. 3 note) is amended by adding at the end the following new paragraph:

"(3) The Commissioner of Customs is authorized to obtain from the operators of centralized cargo examination stations information regarding the fees paid to them for the provision of services at these stations.".

(2) REPORT.—Within 9 months after the date of the enactment of this subsection, the Commissioner of Customs shall submit to the Committees referred to in section 9501(c) of the Omnibus Budget Reconciliation Act of 1987, a report setting forth—

(A) an estimate of the aggregate amount of fees paid to operators of centralized cargo examination stations during fiscal year 1993; and

(B) the variations, if any, among customs districts with respect to the amounts of the fees charged for centralized cargo examination station services.

(c) COMPLIANCE WITH CUSTOMS LAWS.—Section 123 of the Customs and Trade Act of 1990 (19 U.S.C. 2083) is amended—

(1) by redesignating subsection (d) as subsection (e), and

(2) by inserting after subsection (c) the following:

"(d) COMPLIANCE PROGRAM.—The Commissioner of Customs shall—

"(1) devise and implement a methodology for estimating the level of compliance with the laws administered by the Customs Service; and

"(2) include as an additional part of the report required to be submitted under subsection (a) for each of fiscal years 1994, 1995, and 1996, an evaluation of the extent to which such compliance was obtained during the 12-month period preceding the 60th day before each such fiscal year.".

(d) COURIER SERVICES COMPLIANCE REPORT.—The Commissioner of Customs shall initiate a compliance review of certain courier services which may not be eligible for benefits under the regulations of the Customs Service prescribed in part 128 of title 19 of the Code of Federal Regulations and shall submit a report to Congress on the results of such review within 1 year after the date of the enactment of this Act.

SEC. 692. EFFECTIVE DATE.

This title takes effect on the date of the enactment of this Act.

Speaker of the House of Representatives.

Vice President of the United States and
President of the Senate.

19:12 Nov 30, 1993 VerDate 16-NOV-93 Jkt 059200 PO 00000 Frm 00169 Fmt 6655 Sfmt 6501 E:\BILLS\H3450.ENR bend06

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(Table presents the data on Amendment & Mail Processing Complete)

OVERVIEW

SERIAL NUMBER	77873477	FILING DATE	11/16/2009
REG NUMBER	0000000	REG DATE	N/A
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INTL REG #	N/A	INTL REG DATE	N/A
TM ATTORNEY	LEHKER, DAWN FELDMAN	L.O. ASSIGNED	111

PUB INFORMATION

RUN DATE	12/19/2014
PUB DATE	N/A
STATUS	645-FINAL REFUSAL - MAILED
STATUS DATE	07/18/2014
LITERAL MARK ELEMENT	MAGNESITA

DATE ABANDONED	N/A	DATE CANCELLED	N/A
SECTION 2F	YES	SECTION 2F IN PART	NO
SECTION 8	NO	SECTION 8 IN PART	NO
SECTION 15	NO	REPUB 12C	N/A
RENEWAL FILED	NO	RENEWAL DATE	N/A
DATE AMEND REG	N/A		

FILING BASIS

FILED BASIS		CURRENT BASIS		AMENDED BASIS	
1 (a)	NO	1 (a)	YES	1 (a)	NO
1 (b)	YES	1 (b)	NO	1 (b)	NO
44D	NO	44D	NO	44D	NO
44E	NO	44E	NO	44E	NO
66A	NO	66A	NO		
NO BASIS	NO	NO BASIS	NO		

MARK DATA

STANDARD CHARACTER MARK	YES
LITERAL MARK ELEMENT	MAGNESITA
MARK DRAWING CODE	4-STANDARD CHARACTER MARK
COLOR DRAWING FLAG	NO

CURRENT OWNER INFORMATION

PARTY TYPE	11-SUBSEQUENT OWNER BEFORE PUBLICATION
NAME	MAGNESITA REFRACTORIES COMPANY
ADDRESS	425 S. Salem Church Rd. YORK, PA 17408
ENTITY	03-CORPORATION

CITIZENSHIP	Pennsylnania

GOODS AND SERVICES

INTERNATIONAL CLASS	019
DESCRIPTION TEXT	Refractory products not made primarily of metal, namely, refractory bricks, refractory mixes for patching, lining or repairing high temperature apparatus and repairing the lining for furnaces, refractory furnace patching and repair mixes
INTERNATIONAL CLASS	037
DESCRIPTION TEXT	Providing information via a global computer network on constructing, maintaining, and repairing refractory apparatus using refractory products

GOODS AND SERVICES CLASSIFICATION

INTERNATIONAL CLASS	019	FIRST USE DATE	10/00/2008	FIRST USE IN COMMERCE DATE	10/00/2008	CLASS STATUS	6-ACTIVE
INTERNATIONAL CLASS	037	FIRST USE DATE	10/00/2008	FIRST USE IN COMMERCE DATE	10/00/2008	CLASS STATUS	6-ACTIVE

MISCELLANEOUS INFORMATION/STATEMENTS

CHANGE IN REGISTRATION	NO
TRANSLATION	The English translation of "MAGNESITA" is "magnesia" or "magnesite".

PROSECUTION HISTORY

DATE	ENT CD	ENT TYPE	DESCRIPTION	ENT NUM
12/18/2014	TEME	I	TEAS/EMAIL CORRESPONDENCE ENTERED	097
12/17/2014	CRFA	I	CORRESPONDENCE RECEIVED IN LAW OFFICE	096
12/17/2014	ERFR	I	TEAS REQUEST FOR RECONSIDERATION RECEIVED	095
07/18/2014	GNFN	O	NOTIFICATION OF FINAL REFUSAL EMAILED	094
07/18/2014	GNFR	O	FINAL REFUSAL E-MAILED	093
07/18/2014	CNFR	R	FINAL REFUSAL WRITTEN	092
06/04/2014	TEME	I	TEAS/EMAIL CORRESPONDENCE ENTERED	091
06/04/2014	CRFA	I	CORRESPONDENCE RECEIVED IN LAW OFFICE	090
06/04/2014	TROA	I	TEAS RESPONSE TO OFFICE ACTION RECEIVED	089
05/27/2014	GNRN	O	NOTIFICATION OF NON-FINAL ACTION E-MAILED	088
05/27/2014	GNRT	O	NON-FINAL ACTION E-MAILED	087
05/27/2014	CNRT	R	NON-FINAL ACTION WRITTEN	086
04/11/2014	TEME	I	TEAS/EMAIL CORRESPONDENCE ENTERED	085
04/11/2014	CRFA	I	CORRESPONDENCE RECEIVED IN LAW OFFICE	084
03/29/2014	ERFR	I	TEAS REQUEST FOR RECONSIDERATION RECEIVED	083
03/27/2014	RDX3	O	NOTIFICATION FOR REQ FOR RECON DENIED NO APPEAL FILED	082
03/27/2014	RDX1	O	ACTION FOR REQ FOR RECON DENIED NO APPEAL FILED E-MAILED	081
03/27/2014	RRDX	W	ACTION REQ FOR RECON DENIED NO APPEAL FILED COUNTED NOT MAILED	080
03/15/2014	TEME	I	TEAS/EMAIL CORRESPONDENCE ENTERED	079
03/14/2014	CRFA	I	CORRESPONDENCE RECEIVED IN LAW OFFICE	078
03/14/2014	ERFR	I	TEAS REQUEST FOR RECONSIDERATION RECEIVED	077
10/04/2013	GNFN	O	NOTIFICATION OF FINAL REFUSAL EMAILED	076

10/04/2013	GNFR	O	FINAL REFUSAL E-MAILED	075
10/04/2013	CNFR	R	FINAL REFUSAL WRITTEN	074
10/03/2013	TEME	I	TEAS/EMAIL CORRESPONDENCE ENTERED	073
10/03/2013	CRFA	I	CORRESPONDENCE RECEIVED IN LAW OFFICE	072
09/30/2013	PARI	I	TEAS VOLUNTARY AMENDMENT RECEIVED	071
09/20/2013	TEME	I	TEAS/EMAIL CORRESPONDENCE ENTERED	070
09/20/2013	CRFA	I	CORRESPONDENCE RECEIVED IN LAW OFFICE	069
09/20/2013	TROA	I	TEAS RESPONSE TO OFFICE ACTION RECEIVED	068
03/28/2013	GNRN	O	NOTIFICATION OF NON-FINAL ACTION E-MAILED	067
03/28/2013	GNRT	O	NON-FINAL ACTION E-MAILED	066
03/28/2013	CNRT	R	NON-FINAL ACTION WRITTEN	065
02/22/2013	TEME	I	TEAS/EMAIL CORRESPONDENCE ENTERED	064
02/22/2013	CRFA	I	CORRESPONDENCE RECEIVED IN LAW OFFICE	063
02/22/2013	ERFR	I	TEAS REQUEST FOR RECONSIDERATION RECEIVED	062
08/28/2012	GNFN	O	NOTIFICATION OF FINAL REFUSAL EMAILED	061
08/28/2012	GNFR	O	FINAL REFUSAL E-MAILED	060
08/28/2012	CNFR	R	FINAL REFUSAL WRITTEN	059
07/27/2012	TEME	I	TEAS/EMAIL CORRESPONDENCE ENTERED	058
07/26/2012	CRFA	I	CORRESPONDENCE RECEIVED IN LAW OFFICE	057
07/26/2012	TROA	I	TEAS RESPONSE TO OFFICE ACTION RECEIVED	056
02/01/2012	GNRN	O	NOTIFICATION OF NON-FINAL ACTION E-MAILED	055
02/01/2012	GNRT	O	NON-FINAL ACTION E-MAILED	054
02/01/2012	CNRT	R	NON-FINAL ACTION WRITTEN	053
01/12/2012	TEME	I	TEAS/EMAIL CORRESPONDENCE ENTERED	052
01/12/2012	CRFA	I	CORRESPONDENCE RECEIVED IN LAW OFFICE	051
01/12/2012	ERFR	I	TEAS REQUEST FOR RECONSIDERATION RECEIVED	050
01/09/2012	GNS1	O	NOTIFICATION OF SUBSEQUENT FINAL EMAILED	049
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11/19/2009	NWAP	I	NEW APPLICATION ENTERED IN TRAM	001

CURRENT CORRESPONDENCE INFORMATION

ATTORNEY	Thomas J. Moore
CORRESPONDENCE ADDRESS	THOMAS J. MOORE BACON & THOMAS, PLLC 625 SLATERS LN FL 4 ALEXANDRIA, VA 22314-1169
DOMESTIC REPRESENTATIVE	Bacon & Thomas, PLLC

PRIOR OWNER INFORMATION

PARTY TYPE	10-ORIGINAL APPLICANT
NAME	MAGNESITA REFRACTORIES COMPANY
ADDRESS	P.O. Box 7708 York, PA 17404
ENTITY	03-CORPORATION
CITIZENSHIP	Pennsylnania

MAGNESITA

Trademark Trial and Appeal Board Electronic Filing System. http://estta.uspto.gov

ESTTA Tracking number:	**ESTTA649605**
Filing date:	**01/13/2015**

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

Application Serial No.	77873477
Applicant	MAGNESITA REFRACTORIES COMPANY

Notice of Appeal

Notice is hereby given that MAGNESITA REFRACTORIES COMPANY appeals to the Trademark Trial and Appeal Board the refusal to register the mark depicted in Application Serial No. 77873477.

Applicant has filed a request for reconsideration of the refusal to register, and requests suspension of the appeal pending consideration of the request by the Examining Attorney.

The refusal to register has been appealed as to the following classes of goods/services:

- Class 019. First Use: 2008/10/00 First Use In Commerce: 2008/10/00
  All goods and services in the class are appealed, namely: Refractory products not made primarily of metal, namely, refractory bricks, refractory mixes for patching, lining or repairing high temperature apparatus and repairing the lining for furnaces, refractory furnace patching and repair mixes
- Class 037. First Use: 2008/10/00 First Use In Commerce: 2008/10/00
  All goods and services in the class are appealed, namely: Providing information via a global computer network on constructing, maintaining, and repairing refractory apparatus using refractory products

Respectfully submitted,
/THOMAS J. MOORE/
01/13/2015

THOMAS J. MOORE

BACON & THOMAS, PLLC

625 SLATERS LN FL 4

ALEXANDRIA, VA 22314-1169

UNITED STATES

mail@baconthomas.com

703-683-0500

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Sent: 2/26/2015 3:55:08 PM

To: TTAB EFiling

CC:

Subject: U.S. TRADEMARK APPLICATION NO. 77873477 - MAGNESITA - MAGN6002/TJM - Request for Reconsideration Denied - Return to TTAB - Message 1 of 3

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Files: magnesia2-1.jpg, magnesia2-2.jpg, magnesia2-3.jpg, magnesia2-4.jpg, zicoa-1.jpg, zicoa-2.jpg, zircoa2.jpg, firebrick-1.jpg, firebrick-2.jpg, firebrick-3.jpg, 77873477.doc

UNITED STATES PATENT AND TRADEMARK OFFICE (USPTO)
OFFICE ACTION (OFFICIAL LETTER) ABOUT APPLICANT'S TRADEMARK APPLICATION

U.S. APPLICATION SERIAL NO. 77873477

MARK: MAGNESITA

CORRESPONDENT ADDRESS:

THOMAS J. MOORE

BACON & THOMAS, PLLC

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GENERAL TRADEMARK INFORMATION:

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APPLICANT: MAGNESITA REFRACTORIES COMPANY

CORRESPONDENT'S REFERENCE/DOCKET NO:

MAGN6002/TJM

CORRESPONDENT E-MAIL ADDRESS:

mail@baconthomas.com

REQUEST FOR RECONSIDERATION DENIED

ISSUE/MAILING DATE: 2/26/2015

The trademark examining attorney has carefully reviewed applicant's request for reconsideration and is denying the request for the reasons stated below. *See* 37 C.F.R. §2.63(b)(3); TMEP §§715.03(a)(ii)(B), 715.04(a). The following requirement(s) and/or refusal(s) made final in the Office action dated July 18, 2014 are maintained and continue to be final: Section 2(e)(1) and Section 23. *See* TMEP §§715.03(a)(ii)(B), 715.04(a) .

In the present case, applicant's request has not resolved all the outstanding issue(s), nor does it raise a new issue or provide any new or compelling evidence with regard to the outstanding issue(s) in the final Office action. In addition, applicant's analysis and arguments are not persuasive nor do they shed new light on the issues. Accordingly, the request is denied.

If applicant has already filed a timely notice of appeal with the Trademark Trial and Appeal Board, the Board will be notified to resume the appeal. *See* TMEP §715.04(a).

If no appeal has been filed and time remains in the six-month response period to the final Office action, applicant has the remainder of the response period to (1) comply with and/or overcome any outstanding final requirement(s) and/or refusal(s), and/or (2) file a notice of appeal to the Board. TMEP §715.03(a)(ii)(B); *see* 37 C.F.R. §2.63(b)(1)-(3). The filing of a request for reconsideration does not stay or extend the time for filing an appeal. 37 C.F.R. §2.63(b)(3); *see* TMEP §§715.03, 715.03(a)(ii)(B), (c).

Final Descriptiveness Refusal/Refusal on Supplemental Register Maintained and Continued

The examining attorney issued a FINAL refusal on the Supplemental Register because the proposed mark, MAGNESITA, is generic or in the alternative highly descriptive with respect to the goods and services listed in the application. The goods and services are "Refractory products not made primarily of metal, namely, refractory bricks, refractory mixes for patching, lining or repairing high temperature apparatus and repairing the lining for furnaces, refractory furnace patching and repair mix" and "Providing information via a global computer network on constructing, maintaining, and repairing refractory apparatus using refractory products." The final refusal is maintained and continued.

The applicant claims that the examining attorney abused her discretion by using a proper translation of the word MAGNESITA. The examining attorney has not abused her discretion at all. She is merely following TMEP §1209.03(g) which states "the foreign equivalent of a merely descriptive English word is no more registrable than the English word itself. "[A] word taken from a well-known foreign modern language, which is, itself, descriptive of a product, will be so considered when it is attempted to be registered as a trade-mark in the United States for the same product." In re N. Paper Mills, 64 F.2d 998, 1002, 17 USPQ 492, 493 (C.C.P.A. 1933). See In re Tokutake Indus. Co., 87 USPQ2d 1697 (TTAB 2008) (AYUMI and its Japanese-character equivalent held merely descriptive for footwear where the evidence, including applicant's own admissions, indicated that the primary meaning of applicant's mark is "walking"); In re Oriental Daily News, Inc., 230 USPQ 637 (TTAB 1986) (Chinese characters that mean ORIENTAL DAILY NEWS held merely descriptive of newspapers); In re Geo. A. Hormel & Co., 227 USPQ 813 (TTAB 1985) (SAPORITO, an Italian word meaning "tasty," held merely descriptive because it describes a desirable characteristic of applicant's dry sausage)."

The applicant's attorney conducted a search of over 25 websites for refractory goods using MAGNESITA as the search term which resulted in no hits on any of the websites. However, the examining attorney conducted a search of magnesite or magnesia which is the translation of MAGNESITA.

First, the examining attorney directs the applicant's attention to the first attachment to this office action ISPAT GURU. Magnesia, Magnesite and Magnesium Oxide are used interchangeably.

> The word magnesite literally refers only to the natural mineral, but common usage applies this name to three other types of materials, dead burned magnesia (DBM), electro fused magnesia and calcined magnesia also called caustic calcined magnesia. Often magnesia word is replaced by magnesite in these products. These products of magnesite often differ mainly in density and crystal development that results from different levels of heat application.

The examining attorney conducted a search of the websites the applicant mentions in its response. For example, the Zicoa.com website may not have "magnesita" listed as an input in its refractory products. However, the website does state that magnesia is a component in its Zicoa backup products. On the website Firebrickengineers.com, "magnesita" is not mentioned but magnesia is mentioned as a component of its Ladlemax products. The Mineraltec.com website does not list "magnesita" as a component of any of the goods but MgO the chemical symbol for magnesium oxide is listed as a component of the applicant's goods.

The examining attorney also conducted further research on some refractory products and attaches several companies' product information sheets. The Mt. Savage Firebrick lists Magnesium Oxide as a component of the goods. Guidon lists its goods as "burned fused grain magnesite." Pilbrico's, Pilcast lists MgO as a component of the goods. Morgan ThermalCeramics describes their goods as "a high purity cast magnesia."

The examining attorney looked at all the websites and many did not actually produce refractory products. For example, the website for the Edward Orton Jr. Ceramic Foundation states that it provides products for "thermal process verification, thermo-analytical instruments and materials testing services." The applicant is related to the refractory products industry but does not actually produce refractory bricks or other refractory products.

Elgin Butler produces ceramic glazed masonry products such as ceramic tiles. The goods are not for lining the inside of kilns and other high temperature operations but are for construction applications.

Miami Stone Installers are a construction company that installs granite countertops, builds brick and stone walls and builds fireplaces. This company does not produce refractory products.

Finally, the applicant included three large retailers that sell one or two refractory items, Lowe's, Home Depot and Wal-Mart. None of these companies are in the business of producing refractory products.

For the above reasons, the applicant's request for reconsideration is denied and the FINAL refusals under Section 2(e)(1) and under Section 23 are maintained and continued.

/Dawn Feldman Lehker/

Trademark Examining Attorney

Law Office 111

U.S. Patent and Trademark Office

(571)272-9381

dawn.feldman-lehker@uspto.gov

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MAGNESIA

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Magnesia

Magnesia or magnesium oxide (MgO) is a white hygroscopic solid mineral that occurs naturally as periclase. It forms magnesium hydroxide in the presence of water [$MgO + H_2O = Mg(OH)_2$], but this reaction can be reversed by heating magnesium hydroxide to separate moisture.

Magnesium (Mg) is the eighth most abundant element and constitutes about 2 percent of the crust of the earth. It is the third most plentiful element dissolved in seawater, with a concentration averaging 0.13 %. Although magnesium is found in over 60 minerals, only dolomite, magnesite, brucite, carnallite, and olivine are of commercial importance. Magnesium and magnesium compounds are produced from seawater, well and lake brines and bitterns, as well as from the above mentioned minerals.

Magnesite ($MgCO_3$), the naturally occurring carbonate of magnesium (Mg) is one of the key natural sources for the production of magnesia (MgO) and subsequently fused magnesia. It is the world's largest source of magnesia. It contains a theoretical maximum magnesia content of 47.6 %. It occurs in two distinct physical forms namely (i) macro-crystalline and (ii) crypto-crystalline. Crypto-crystalline magnesite is generally of a higher purity than macro-crystalline ore, but tends to occur in smaller deposits than the macro-crystalline form.

5 Foods to never eat
Cut down a bit of stomach fat every day by never eating these 5

The word magnesite literally refers only to the natural mineral, but common usage applies this name to three other types of materials, dead burned magnesia (DBM), electro fused magnesia and calcined magnesia also called caustic calcined magnesia. Often magnesia word is replaced by magnesite in these products. These products of magnesite often differ mainly in density and crystal development that results from different levels of heat application. The three products of magnesia are shown in Fig 1.

Dead burned magnesia
Electro fused magnesia
Calcined magnesia

Fig 1 Products of magnesite

Magnesia is an alkaline earth metal oxide. Magnesium oxide is normally produced by the calcinations of naturally occurring minerals mainly magnesite. Other important sources of magnesium oxide are seawater, underground deposits of brine and deep salt beds from which magnesium hydroxide is processed. The general properties of magnesia is given in Tab 1.

Tab 1 Properties of magnesia

Property	Units	Minimum Value	Maximum Value
Atomic Volume (average)	cum/kmol	0.0056	0.0058
Density	g/cc	3.54	3.58
Compressive Strength	MPa	833.3	1666.6
Hardness	MPa	5000	7000
Modulus of Rupture	MPa	100	200
Latent Heat of Fusion	kJ/kg	1670	1880
Maximum Service Temperature	K	2250	2400
Melting Point	K	3080	3135
Specific Heat	J/kg K	880	1030
Thermal Conductivity	W/m K	30	60
Thermal Expansion	10^{-6}/K	9	12

Magnesia is a refractory material which is physically and chemically stable at high temperatures. Refractory industry is the largest consumer of magnesia worldwide.

The terms dead burned magnesia (DBM), electro fused magnesia (EFM), or refractory magnesia are used predominantly in the refractory industry where they are mainly used to make shaped and unshaped products to line high temperature vessels such as furnaces and kilns in the steel, cement, non-ferrous, glass and chemical industries. The terms refer to the granular product produced by firing of magnesite, magnesium hydroxide, or another material reducible to magnesia at temperatures which normally exceeds 1500 deg C. The heating process is to be of sufficiently long duration to produce a dense, reasonably weather stable granule for use in manufacturing refractory materials.

Dead burned magnesia (often called dead burnt) is used almost exclusively for refractory applications in the form of basic bricks and granular refractories. Dead burned magnesia has the highest melting point of all common refractory oxides and is the most suitable heat containment material for high temperature processes in the steel industry. Basic magnesia bricks are used in furnaces, ladles and secondary refining vessels. Electro fused magnesia is superior to dead burned magnesia in strength, abrasion resistance and chemical stability.

The terms high grade and high purity generally refer to a refractory magnesia containing more than 96 % MgO, a density greater than 3.30 g/cc, preferably 3.40 g/cc, and a proper relationship of auxiliary oxides.

Magnesia is used in the steel industry as a refractory brick impregnated with tar, pitch, graphite etc to give optimum properties for corrosion

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Cut down a bit of stomach fat every day by using this 1 weird old tip.
➤ Tip

resistance in environments of basic slags. Calcined magnesia is used in steel making to modify the properties of steel making slags during steel making as well as to change slag characteristics for slag splashing in BOF vessels. The main application of magnesia is in steel refractories with more than 70 % of all type of magnesia refractories used in steel production and continuous casting operations.

High grade DBM and EFM are used mainly in bricks/shapes to produce the following refractories.

- Magnesia carbon bricks
- Magnesia bricks
- Magnesia chrome bricks
- Magnesia spinel bricks
- Magnesia dolomite bricks
- Magnesia carbon alumina bricks

DBM is mostly used in the manufacture of basic monolithic refractories such as gunning repair products, tundish working linings and precast shapes (tundish dams/weirs). Applications for sintered magnesite include isostatic pressed shapes and flow control systems (sliding gate plates etc).

High grade magnesia for refractory applications is classified according to purity (MgO content), bulk specific gravity (BSG), periclase crystal size (PCS) and CaO/SiO2 ratio. When the grain size of the magnesia crystal is large then its stability is very good. Typically, high grade DBM for the steel industry requires MgO content of 97 % minimum, BSG of 3.40 minimum, PCS of 100 microns minimum and CaO/SiO2 ratio of 2.0 minimum.

The addition of fused magnesia grains can greatly enhance the performance and durability of basic refractories such as mag carbon bricks. This is a function of a higher bulk specific gravity and large periclase crystal size, plus realignment of accessory silicates. Refractory grade fused magnesia has exacting specifications and is normally characterized by the following.

- Generally high magnesia content (minimum 97 % MgO and up to/exceeding 99 % MgO)
- Low silica which means high lime to silica ratio of 4 minimum
- Densities of 3.50 g/cc or more
- Large periclase crystal sizes (1000 microns minimum)

Due to its relatively high chemical stability, strength and resistance to abrasion as well as excellent corrosion resistance, refractory grade fused magnesia is used in high wear areas in steel making. Lower grade EFM is also used in refractory bricks and shapes. EFM also has high thermal conductivity.

Calcined magnesia is normally graded according to purity, sizing and reactivity. Most of the calcined magnesia produced has MgO content ranging from 85 % to 95 %. It has a loss of ignition (LOI) value of less than 10 % and has a high reactivity which means that it has got high absorbing capacity for water vapour and CO2.

Historically the main global producers of high grade DBM have been based on synthetic technology converting magnesium rich seawater or brine into magnesia. The only natural high grade DBM producers are Turkey and Australia which are based on cryptocrystalline magnesite deposits.

Production process for calcined magnesite, DBM, and EFM

MgO is produced by the calcination of MgCO3 or Mg(OH)2 or by the treatment of magnesium chloride with lime followed by heat. Calcining at different temperatures produces magnesium oxide of with different reactivity. High temperatures (1500 deg C to 2000 deg C) produces dead-burned magnesia, an unreactive form used as a refractory. Calcining temperatures (1000 deg C to 1500 deg C produces hard-burned magnesia which has limited reactivity while lower temperature, (700 deg C to 1000 deg C) calcining produces light-burned magnesia, a reactive form, which is called calcined magnesia.

Magnesite is converted into magnesia by the application of heat which drives off carbon dioxide (CO2), thereby converting the carbonate to the oxide of magnesium (MgO).

Magnesite, from both natural sources (primarily magnesite) and synthetic sources (seawater, natural brines or deep sea salt beds), is converted into calcined magnesia by calcining to between 700 deg C and 1000 deg C, driving off most of the contained CO2. Calcined magnesia is both an end product and an intermediary step in the chain of magnesia products.

Further calcining of magnesite at higher temperatures between 1500 deg to 2000 deg C results in the largely inert product, dead burned magnesia. Heating to this level drives off all but a small fraction of the remaining CO2 to produce a hard crystalline non reactive form of magnesium oxide known as periclase. Dead burned magnesia exhibits exceptional dimensional stability and strength at high temperatures

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magnesium oxide known as periclase. Dead burned magnesia exhibits exceptional dimensional stability and strength at high temperatures.

Fused magnesia is produced in a three phase electric arc furnace. Taking high grade magnesite or calcined magnesia as raw materials, 12 hours is required for the fusion process at temperatures in excess of 2750 deg C. The process promotes the growth of very large crystals of periclase (greater than 1000 microns compared 100 microns for dead burned magnesia) with a density approaching the theoretical maximum of 3.58 g/cc.

In fused magnesia production, the main constraints on capacity are the size and number of electric arc furnaces, and the cost of energy. The manufacture of fused magnesia is very power intensive with electricity consumption varying between 3500-4500 kWh/ton.

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Pressed or Cast Zirconium Oxide Compositions Engineered for High Temperature Cycling Environments

Coarse grain tubes

Calcia, Yttria or Magnesia stabilized coarse grain tubes are manufactured in various grain sizes, mass and shapes to satisfy your specific application and deliver long-term service. Markets served include: non-reactive firing of electronic components and crystal growing.

COMPOSITION 1651

Tubes made of composition 1651 are typically used for high temperature induction heated crystal growing furnaces. 1651 is composed of zirconia, stabilized with 3.5% calcia by weight. These tubes will survive repeated cycling from room temperature to 2000°C (3632°F), when used with Zircoa backup material. Please contact us to discuss your specific needs.

SPECIFICATIONS

Standard Sizes of Coarse Grain Tubes

Dimensions			
OD		ID	
mm	inches	mm	inches
38.1	1.50	25.4	1.00
38.1	1.50	12.7	0.50
50.8	2.00	38.1	1.50
50.8	2.00	31.7	1.25
50.8	2.00	25.4	1.00
63.5	2.50	50.8	2.00
63.5	2.50	44.4	1.75
63.5	2.50	38.1	1.50
69.8	2.75	57.1	2.25
76.2	3.00	63.5	2.50

[illegible]	[illegible]	[illegible]	[illegible]
76.2	3.00	50.8	2.00
88.9	3.50	76.2	3.00
88.9	3.50	63.5	2.50
92.2	3.63	79.5	3.13
101.6	4.00	88.9	3.50
101.6	4.00	76.2	3.00
114.3	4.50	101.6	4.00
127.0	5.00	114.3	4.50
127.0	5.00	101.6	4.00
152.4	6.00	139.7	5.50
152.4	6.00	127.0	5.00
177.8	7.00	152.4	6.00
190.5	7.50	171.4	6.75
222.2	8.75	196.8	7.75

Physical Properties of Various Zirconia Compositions

Composition	1968	1651	872	871	890	2290	3004
Stabilizer	CaO (a)	CaO (a)	CaO (a)	CaO (a)	Y2O3 (b)	Y2O3 (b)	MgO (c)
Bulk Density (g/cm3)	3.3	4.2	4.1	3	4	4.5	4.6
Porosity (%)	35	25	30	40	29	23	16
Modulus of Rupture (psi)	450	2,400	1,100	800	1300	2400	3500
Coefficient of Thermal Expansion RT-1300°C (in/in/°C)	8.2	7.3	8	7.9	9.4	5.9	2.3
Thermal Conductivity (W/m-°K) 800°C	0.68	1.2	1.2	0.52	1	1.2	1.4

a. calcia b. yttria c. magnesia

Refractory Backup (Thermal Insulation)

Extend the life of your furnace, and maintain tighter control over your furnace temperatures with Zircoa's pre-sintered grog refractory backup .

- **Zircoa Backup 1859** — Partially stabilized with magnesia and calcia. Available in -8+100 Tyler mesh size.
- **Zircoa Backup 3001** — Partially stabilized with magnesia. Available in -8+20 Tyler mesh size.
- **Zircoa Backup 108** – Calcia stabilized bubble zirconia. Available in -10+30 Tyler mesh size.

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http://www.zircoa.com/product.coarse.grain/burner.blocks.html 02/10/2015 07:28:42 AM

Zircoa

Burner Blocks for Glass Furnace Oxy-fuel Firing

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Contact a Product Specialist:
• USA Worldwide: Daniel McLean | (440)519-3947 | (440)248-8864 (Fax) | Online Form
• Europe, the Middle East, Africa: Thomas Böhm | +49-611-335497-22 | +49-611-335497-55 (Fax) | Online Form

Distributors:
• India, Sri Lanka, Bangladesh & Pakistan: Dynatec Sales | +91-22-28612404 | +91-22-28631952 (Fax)

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Burner Blocks Reduce NOx Emissions, Extend Burner Life and Improve Glass Quality

Burner blocks are engineered to withstand high temperatures and the contaminants present in fuel oil, while providing the added resistance to corrosion. Either Calcia, Yttria or Magnesia stabilized Zirconium Oxide compositions will satisfy your unique requirements and extend burner block life to more than one year. Markets served include: glass and quartz melting and high temperature sintering.

SPECIFICATIONS

Physical Properties of Various Zirconia Compositions

Composition	1968	1651	872	871	890	2290	3004
Stabilizer	CaO (a)	CaO (a)	CaO (a)	CaO (a)	Y2O3 (b)	Y2O3 (b)	MgO (c)
Bulk Density (g/cm3)	3.3	4.2	4.1	3	4	4.5	4.6
Porosity (%)	35	25	30	40	29	23	16
Modulus of Rupture (psi)	450	2,400	1,100	800	1300	2400	3500
Coefficient of Thermal Expansion RT-1300°C (in/in/°C)	8.2	7.3	8	7.9	9.4	5.9	2.3
Thermal Conductivity (W/m-°K) 800°C	0.68	1.2	1.2	0.52	1	1.2	1.4

a. calcia b. yttria c. magnesia

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"Experts in Heat Management"

FIRE BRICK ENGINEERS COMPANY

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Refractory Brick Products

Brick by Resco, An American Owned Refractory Company

RESCAL

FURNAL HS

NARCAL

LO-SIL SUPER

ALUMINA BRICK

ALUMEX

KRIAL

KRIMUL

DURALITE

DURATAB

KRICOR

KRITAB

SENECA

LADLEMAX

ALUMINA BRICK

This is a general guide to the alumina brick products available from RESCO Products. These

bricks are manufactured with the highest quality materials at ISO-certified plants, using modern

SPC procedures. The brick are formulated and shaped to meet the high temperature and corrosive

conditions present in the production of industrial goods-from aggregate materials and primary

metals to complex hydrocarbon chemicals used throughout the world.

EXTRA HIGH ALUMINA BRICK

KRICOR ·RESCAL 90 XD

These unique 90+% alumina brick are made from tabular alumina with a mullite matrix. They are

characterized by high resistance to slag attack, low porosity and permeability, high hot strength and density, resistance to severe abrasion and excellent dimensional stability. These mullite bonded 90% alumina refractories are used in the working linings of coreless and channel induction furnaces.

Other applications include: Carbon black reactors · Ceramic kiln linings · High temperature chemical and waste incinerators · Induction furnace linings, skid rails, and SRU linings.

DURA-TAB CA

DURA-TAB CA is a burned, phosphate-bonded 90% alumina-chrome brick. Compared to mullitebonded 90% alumina brick, it offers exceptional service against highly aggressive furnace slag.

DURA-TAB SC

DURATAB SC is a unique product that combines silicon carbide with high purity alumina to produce a refractory possessing exceptional resistance to very aggressive furnace slag associated with induction furnaces processing molten iron, and which is quite resistant to thermal shock. DURATAB SC is recommended for use in the slag lines of iron melting furnaces.

KRITAB -RESCAL 10 CR -RESCAL 10 CR SR

All of these brick are alumina-chrome-solid solution-bonded 90% alumina brick. These brick are truly solid solution-bonded brick; the matrix consists of a solid solution of chromic oxide and alumina which results in extra hot load resistance and ability to withstand high temperature chemical attacks. The silica-free bonding system and neutral chemistry offer excellent resistance to erosion/corrosion from iron oxide-silica rich slags. They can be used in severe corrosion areas of channel type induction furnaces and any other applications where load-bearing and corrosion resistance are critical factors. They are recommended for the slag line of arc holding furnaces, carbon black reactors and incinerators. The 10 CR SR is the spall resistant product of the alumina-chrome family.

DURA-TAB

DURATAB is a 95% alumina mullite-bonded brick.

HIGH ALUMINA BRICK FOR ALUMINUM CONTACT

LO-SIL SUPER

Among the many refractories developed for aluminum melting furnaces, this 90% alumina brick with non-wetting additive stands out for its exceptional resistance to attack by molten aluminum.

LO-SIL SUPER is ideal in furnace linings for the production of hard alloys. LO-SIL SUPER brick minimize silicon pick-up and furnace downtime; they preserve the quality of the molten alloy.

Their hardness and high modulus of rupture give the brick lining excellent resistance to impact and abrasion.

FURNAL HS and RESCAL 80 BP (Burned)

These two product are ideal choices for molten aluminum contact in melting and holding furnaces. They perform well in aluminum furnaces with high mechanical wear and abuse. Both are bauxite-based, burned 85% alumina brick with superior hot and cold strengths. Their non-wetting matrix and high strengths make either an ideal choice for melting or holding furnaces, especially those utilizing heavy cold charges.

From: Feldman-Lehker, Dawn

Sent: 2/26/2015 3:55:09 PM

To: TTAB EFiling

CC:

Subject: U.S. TRADEMARK APPLICATION NO. 77873477 - MAGNESITA - MAGN6002/TJM - Request for Reconsideration Denied - Return to TTAB - Message 3 of 3

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Electric Arc Furnace (EAF) Gunnables - Ferrogun Series

FERROGUN series of materials are hot repair gunning mix products engineered and formulated according to the specific requirements of EAFs. Ferrogun's adherence property and refractoriness result in high performance with reduced refractory cost per ton steel.

Asmaş provides user-friendly, low maintenance automated equipment for gunning applications in EAFs such as Batchguns with or without Robogun or Miniscan manipulators including Laser Scanning technology options.

Ferrogun Product Range for EAFs:

http://www.mineralstech.com/Pages/Minteq/Asmas-Electric-ARC-Furnace-Products.aspx
02/10/2015 08:31:47 AM

Ferrogun Product Range for EAF:
Ferrogun SP
Ferrogun Q
Ferrogun QP
Ferrogun Gold

Electric Arc Furnace (EAF) Fettling Materials - Ferrofrit Series

FERROFRIT 75D and 77D is a cold repairing material for electric arc furnace bottoms and banks. It is a dry mix, which can be applied by ramming or vibration. Its chemical composition and rapid crusting by temperature ensure high durability against any mechanical wear-out and slag effects.

FERROFRIT 80 HR and 213 HR is a hot repairing fettling material for electric arc furnace bottoms and banks. Its chemical composition and quick sintering properties ensure high durability against any mechanical wear-out and slag effects. Ferrofrit's unique grain size distribution provides excellent density.

Ferrofrit DC-HR is a magnesia - carbon mix, ready for use with high electrical conductivity for hot repairs of DC furnace bottoms. Ferrofrit DC-HR is engineered to have excellent flowability and smooth dispersion during application. The flexibility of the material helps to repair only the eroded areas. Higher productivity in usage reduces refractory consumption and cost. Hardening time is set to be 25 minutes. Selected high quality magnesite and rigid process control result in consistent and superior performance of Ferro DC-HR.

Fettling Product Range:

Ferrofrit 75D
Ferrofrit 77D
Ferrofrit 80 HR
Ferrofrit 213 HR
Ferrofrit DC-HR

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MT. SAVAGE FIREBRICK

17901 Mt. Savage Road NW, Frostburg, MD 21532
PHONE 301-689-1788 FAX 301-689-1798

TECH DATA
Fireclay

CLASSIFICATION: ASTM C-105 (Discontinued)
Fireclay

P.C.E. Cone 29 2984°F

TYPICAL CHEMICAL ANALYSIS:

Silica	(SiO_2)	59.9
Alumina	(Al_2O_3)	32.9
Ferric Oxide	(Fe_2O_3 and FeO)	1.97
Titanium Oxide	($Ti0_2$)	1.48
Calcium Oxide	(Ca0)	.57
Magnesium Oxide	(MgO)	.89
Alkalies	(Na_2O+K_2O+Li_2O)	2.29

NOTE: All data subject to reasonable deviation. FC/01/06

Technical Data

Harbison-Walker Refractories Company
HW
600 Grant Street
Pittsburgh, PA 15219

2/98: 1447

GUIDON®

Classification: Burned Fused Grain Magnesite - Chrome Brick

Physical Data: (Typical)	English Units		SI Units
	lb/ft³		kg/m³
Bulk Density	206		*3,300*
Apparent Porosity, %	13.9		*13.9*
	lb/in²		N/mm²
Crushing Strength At 70°F *(21°C)*	8,620		*59*
Modulus of Rupture At 70°F *(21°C)* At 2700°F *(1482°C)*	 1,610 450		 *11* *3*
Reheat Test Permanent Linear Change, % After Heating at 3140°F *(1727°C)*		+0.2	
Load Test, 25 psi *(1.8 kg/cm²)* % Linear Subsidence After Heating at 3100°F *(1705°C)*		0.3	

Chemical Analysis: (Approximate)
(Calcined Basis)

Silica	(SiO_2)	1.6 %
Alumina	(Al_2O_3)	8.5
Titania	(TiO_2)	0.3
Iron Oxide	(Fe_2O_3)	11.0
Lime	(CaO)	0.8
Magnesia	(MgO)	58.3
Chromic Oxide	(Cr_2O_3)	19.5

The data are typical of the properties for the most commonly produced commercial sizes.
The data are subject to reasonable variations and should not be used for specification purposes.

ASTM Test Methods, where applicable, used for determination of data.

12/8/97 Dev.

Plibrico Company LLC
1010 N. Hooker Street
Chicago, IL 60642
Ph. 312 337-9000 Fax 312 337-9003
www.Plibrico.com

Technical Data Sheet

Plicast HyMOR 90 MA-7 V KK

Product Number 14236 Date 1/1/2013

Product Description
A high alumina, magnesium aluminate spinel enriched, low cement castable. Vibration cast only.

Service Limit -	3300° F	1,815. °C	
Density to place	183 pcf	2,931 kg/m3	
Density in service	183 pcf	2,932 kg/m3	
Mim Time berfore firing	16 hr		

Std. package	55 # / 25 kg Bag			
Water range per std. package:				
Casting	1.1 to	1.3 qts	1.0 to	1.2 l
Pumping	to	qts	0.0 to	0.0 l

Chemistry % (calcined)

Al_2O_3	91.7	P_2O_5	
SiO_2	0.2	Alk.	0.3
Fe_2O_3	0.0	MgO	6.3
CaO	1.6	SiC	
TiO_2	0.0	ZrO_2	
		Other	

Thermal Conductivity

	btu*in/hr*ft² * F°	w/m°C
500F / 260C	20.0	2.88
1000F / 540C	19.0	2.73
1500F / 815C	19.0	2.73
2000F / 1090C	20.0	2.88

Abrasion Loss
per ASTM C 704
after 1500 F

cc

Coefficient of Thermal Expansion
(reversable)
5.4 x 10^-6 in/in F
9.7 x 10^-6 m/m C

Temperature per ASTM C113 / C865	Linear Change per ASTM C113 / C179	Cold MOR per ASTM C133 psi	MPa	CCS per ASTM C133 psi	MPa	Hot MOR per ASTM C583 psi	MPa
230 F / 110 C	0.0%	1800	12.4	8000	55		
1500 F / 815 C	-0.2%	1500	10.3	8000	55	1300	9.0
2000 F / 1090C	-0.2%	2000	13.8		0	1350	9.3
2500 F / 1370 C	0.2%	2500	17.2		0	2200	15.2
3000 F / 1650 C	-0.3%	2800	19.3		0		0.0

Other Data

Heat Up Guide
Schedule C or C-Linear

ASTM Class
C 401 Class G

Low Cement Castable

Note:
All data are averaged results of ASTM tests (where applicable) on laboratory vibration cast specimens. Reasonable variations in data can be expected. Data is not to be used for specification purposes. Product data is periodically updated to reflect product / raw material / process / testing changes. Please consult your Plibrico representative to make sure you have the most current data.

Morgan ThermalCeramics

Triangle 95C Magnesia

Datasheet Code EU: 95CMAG.R078 Fired Shapes

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DESCRIPTION:-
A high purity cast magnesia

PHYSICAL PROPERTIES		TARGET VALUES	LIMITING VALUES
Bulk Density	(kg/m^3)	2790	2690 min
Apparent Porosity	(%)	20.3	22.8 max
M.O.R.	(MN/m^2)	18.5	13.5 min

CHEMICAL ANALYSIS	TYPICAL VALUES	
SiO_2	3.4	5.0 max
Al_2O_3	0.1	0.3 max
Fe_2O_3	0.1	0.3 max
CaO	0.9	1.8 max
MgO	95.5	92.5 min
Na_2O/K_2O	0.1	0.3 max

SUPPLEMENTARY PROPERTIES		
Thermal Conductivity	($Wm^{-1}K^{-1}$)	3.25 (@ 650°C)
		2.60 (@ 1100°C)
Coeff. of Thermal Expansion	($x10^{-6}/°C$)	12-15 (300-1500°C)

SHAPE CAPABILITY
Simple cast shapes
TOLERANCES
All pieces conform to relevant drawings.
APPLICATIONS
Induction melting crucibles for special alloy applications.

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Abbreviation to define MgO Find

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What does MgO stand for?

MgO stands for Magnesium Oxide (chemistry)

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Manipal Global Nursing Program (India)
Mgahinga Gorilla National Park (Uganda)

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- Mahatma Gandhi National Rural Employment Guarantee Act (India)
- Mahatma Gandhi National Rural Employment Guarantee Scheme (India)
- Monona Grove Nursery School (Madison, WI)
- Management
- Main Geophysical Observatory (Russia)
- Mandatory General Offer
- Marine Gas Oil (marine fuel)
- Materials Global Operations (General Motors)
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Sent: 2/26/2015 3:55:09 PM

To: TTAB EFiling

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Subject: U.S. TRADEMARK APPLICATION NO. 77873477 - MAGNESITA - MAGN6002/TJM - Request for Reconsideration Denied - Return to TTAB - Message 2 of 3

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FURNAL and RESCAL 80 PA (Baked)

FURNAL and RESCAL 80 PA are 85% alumina, phosphate containing baked brick, each with a unique non-wetting matrix, which minimizes silicon pickup and facilitates fast and easy furnace cleaning. They are strong and can withstand the severe mechanical abrasive conditions encountered in today's aluminum furnaces. Dimensional stability and exacting manufacturing tolerances assure fast, long lasting installations. Both products recommended for metal contact with a broad range of aluminum alloys.

MARELAN PLANT

High Alumina Brick-Alkali and Creep Resistant

The alkali and creep resistant KRIAL brick are high purity, low alkali products based on high purity aluminas, calcined bauxitic kaolins, and high grade andalusite. Designed originally for use in blast furnaces and blast furnace stoves due to their low creep rate and carbon monoxide resistance, several of these products have also flourished in other markets including glass furnace regenerators and carbon anode baking furnaces. All of the brands listed on this page give an "A" rating in the ASTM carbon monoxide (CO) disintegration test.

KRIAL 50-A

KRIAL 50-A has a combination of creep resistance, dimensional stability, resistance to chemical attack and thermal conductivity which make it ideally suited for heat exchange applications. Its high purity micro structure with a low glass content and a high amount of mullite is extremely creep and spall resistant. It can withstand higher operating temperatures than typical low flux super duty brick. It is an ideal product for use in high-efficiency, thin-wall blast furnace stove checkers . It is also an excellent choice for

all areas of carbon anode baking furnaces where its refractoriness and superior mechanical properties are essential. Its matrix mineralogy is very resistant to the destructive silica depletion caused by fluorine attack. KRIAL 50-A offers the baking pit operator the opportunity to improve productivity by significantly raising firing temperatures and reducing cycle times.

KRIAL 60

KRIAL 60 is a low alkali, low porosity brick with outstanding hot strength. Its superior resistance to thermal shock, abrasion and alkali attack help make it the cost effective solution for a variety of severe applications. KRIAL® 60 has seen cost effective solution for a variety of severe applications. KRIAL® 60 has seen extensive service in blast furnace stack linings and is highly recommended for use in torpedo ladles, chemical and waste incinerators and as tie brick in carbon anode baking furnaces.

KRIAL 60-A +

KRIAL 60-A+ is the primary answer for blast furnace and blast furnace stove applications requiring a low flux 60% alumina product. KRIAL 60-A+ is a low porosity, high strength product and has become the choice for most thin wall stove checker applications. It has been quite successful in blast furnace stack linings and torpedo ladles.

KRIAL 65-A

KRIAL 65-A is recommended for use in the highest temperature areas of blast furnace stoves. It is extremelycreep resistant at 2730°F and is primarily utilized in the uppermost checkers and dome of the stove. KRIAL 65-A is andalusite-based and provides all the benefits of high fired mullite products. It's matrix has an exceptionally low glass content.

KRIMUL

KRIMUL is an ultrahigh purity, low flux brick that provides the maximum resistance to hot load deformation and creep in the 60% alumina product range. This andalusite-based brick satisfies all ASTM requirements for classification as a mullite refractory. Its outstanding load bearing properties at 2550°Fqualify it for severe blast furnace stove and hot blast main applications. Also, its resistance to low basicityslag make it a natural choice for torpedo ladles. KRIMUL has good abrasion and thermal shock resistance and has performed well in glass furnace regenerators due to its excellent resistance to alkali attack.

RESIN-BONDED ALUMINA-CARBON

BRICK

LadleMax 80 R5

LadleMax 80 R5 is a resin-bonded alumina-carbon brick. The brick is a metal-free, 80% alumina class product with 5% carbon content. This product is used to line the low wear areas of iron and steel ladle bottomsand sidewalls.

LadleMax BSC

http://www.firebrickengineers.com/refractoy.asp 02/10/2015 07:55:26 AM

LadleMax BSC is a resin-bonded alumina-carbon brick with silicon carbide brick designed for hot metal carand iron charging ladle service. This bauxite-based, iron-friendly refractory is typically used in low wear areas of the vessel sidewalls and bottoms.

LadleMax ASC

LadleMax ASC is a resin-bonded alumina-carbon brick with silicon carbide that also contains fused alumina. This product is used in the iron charging ladles and hot metal cars such as tap stream impact pads or stir quadrants.

LadleMax AMG

LadleMax AMG is an 80% alumina brick containing magnesia, antioxidants, and graphite. At steelmaking temperatures the mix ingredients react to form various carbon and magnesia-spinel phases. These reactions are expansive and provide a brick lining whcich appears monolithic. This product is recommended for ladle bottoms and barrels of steel shops making aluminum-killed steels.

LadleMax AMG SL

LadleMax AMG SL is similar to AMG, but contains a higher quantity of magnesia for improved slag resistance.

LadleMax AMG HP

LadleMax AMG HP is an 80% alumina brick containing a blend of refractory grade alumina plus magnesia, antioxidants, and graphite. At steelmaking temperatures, these mix ingredients react to form various carbon and magnesia-alumina spinel phases. AMG HP is suggested for steel ladle bottoms and barrels when a 10% to 25% life improvement is needed over regular AMG. This product has a higher purity composition than LADLEMAX AMG (higher alumina and less silica, lime, and iron oxide).

LadleMax AMG 90

LadleMax AMG 90 is similar to regular AMG, but it contains fused alumina, the alumina content is 90%. It was developed for severe operating conditions associated with tap stream impact and buffer zones between lower quality ladle barrel brick and Magnesia-Carbon slaglines. LADLEMAX AMG 90 is typically zoned with other AMG compositions to provide a balanced wear pattern to achieve maximum heat life.

LadleMax AMG 90 SL

LadleMax AMG 90 SL is similar to AMG 90, but contains a higher quantity of magnesia for improved slag resistance.

LadleMax AMG 95

LadleMax AMG 95 is similar to AMG 90 with improved chemistry. Product has shown wear rate improvement of 20-25% above AMG 90.

GENERAL PURPOSE ALUMINA BRICK

RESCAL BB

This product is a low duty fireclay backup brick for cryolite cells. This is a resale product.

KRIAL 50

This is a general purpose 50% alumina brick.

NARCAL 60

This general purpose 60% alumina brick is an excellent choice as an upgrade to super duty brick. This brick is not recommended for CO atmospheres, high temperatures, alkali environments, or load-bearing applications.

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their low modulus of elasticity gives the products excellent resistance to torsional stresses created by rotation of the kiln.

KRIAL P-70 BF

KRIAL P-70 BF is a low iron, high strength 70 % alumina brick designed for resistance to impact, abrasion, and carbon monoxide (CO) attack in severe wear blast furnace and DRI applications.

ALUMEX P-8 · SENECA 85 P

These brick are more refractory than the ALUMEX P-7, and they possess exceptional strength. They have excellent resistance to thermal spalling and are recommended for applications where very dense brick with low porosity are required and where operating temperatures are more severe. Installed in such areas, longer service life than that obtained from refractories of lesser quality is assured. Their use have proven economical in reheat furnace skid rails, ladles, cement kilns, and where erosion, abrasion, thermal shock and extremely high temperatures are encountered.

ALUMEX P-85 HS

ALUMEX P-85 HS exhibits a combination of very high strengths, high abrasion resistance, and excellent thermal shock resistance. Its high purity composition yields a refractory product that can withstand severe alkali attack. It is recommended for use in electric furnace roofs, rotary cement kilns, reheat furnace skid rails and other furnace applications where erosion and abrasion from slag and metal are severe at high temperature. XP-85 HS ceramic anchors will be made and stocked at East Canton.

ASMAS

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Blast Furnace Refractories >
BOF / EAF / MMH Refractories >
Other Iron & Steel Furnace Products
Tundish Refractories

Asmas > Tundish Refractories

Tundish Refractories

Tundish Spray Coating - Ferrocon SGS Series

FERROCON SGS series, sprayable coating material is a proven performer for tundish wear lining. Quick and clean deskulling property is the key success function of Ferrocon SGS series.

The technology for pneumatic placement of insulating refractories has led to the development of the Ferrocon SGS Series Spray Products. This concept has gained worldwide acceptance in many billet, bloom and slab casting facilities as a result of its simple operation.

It has led to lower labor costs because of the decrease in installation time. The system occupies less space, thus is applicable for even the most congested tundish assembly areas. Ferrocon SGS can be applied with zero rebound-to any tundish- regardless of geometry.

It can be sprayed on any refractory surface up to 80°C, which enables the steelmaker to utilize residual heat in the tundish helping

Asmas Tundish Products

http://www.mineralstech.com/Pages/Minteg/Asmas-Tundish-Refractories.aspx 02/10/2015 08:31:01 AM

to cure the lining. Consumption can be optimized by placing less material in low erosion zones.

Ferrocon SGS is designed to adhere to the steel skull - not the tundish - which makes skull removal a safe, simple procedure.

Product Range:

- Ferrocon SGS LT
- Ferrocon SGS 88
- Ferrocon SGS 85
- Ferrocon SGS 80
- Ferrocon SGS 75
- Ferrocon SGS 70
- Ferrocon SGS 65
- Ferrocon SGS 60

Please contact your Asmas Representative for any further information required.

Tundish Boards and Mixes - Ferrocon and FCM Series

FERROCON Tundish Boards are designed and manufactured both in magnesite and silica compositions to match specific steel production needs.

More than 10 million tons of steel per year is continuously being cast through Ferrocon tundish boards.

FERROCON-MgO is engineered to withstand ultralong sequences of high performance meltshops.

With increasingly sophisticated end use for tundish liner products, Ferrocon MgO performances such as 85 heats of 82 tons ladle lasting 76 hours, 73 heats of 100 tons ladle lasting 63 hours and many other ultralong sequence lengths are achieved with full confidence. Ferrocon MgO is tailor-made with variable thicknesses and densities as well as unique slag line support system according to tundish design and application.

Selected raw material, thorough research, rigid process control result in the consistent quality of Ferrocon MgO tundish boards. With Ferrocon MgO, back-up lining is prolonged and tundish deskulling is an easy and simple procedure.

FERROCON-Silica is engineered in different densities from standard type to the premium MULTIPOUR to completely match the liner to user application.

Carbon and low alloy steels with less than 1.2 % manganese are routinely cast with Ferrocon Silica boards.

Ferrocon Silica offers the most economic solution for low sequence casting, which does not exceed 10 hours.

In addition to the full spectrum of liner boards, **FCM series** sealing mortar and ramming mixes produced both in silica and magnesite base to match the liner compositions are available to complete the full installation of each tundish lining.

Product Range:

- FCM 10 –Silica Ramming mix
- FCM 20 – MgO Ramming Mix
- FCM 25 – High Purity MgO Ramming Mix
- FCM 30 – Alumina Ramming Mix
- [illegible]

- FCM 50 – Silica Sealing Mortar
- FCM 60 – MgO Sealing Mortar
- FCM 70 – Al-Si Sealing Mortar

Ferrocon Tundish Board Ready To Cast

Ferrocon Tundish Board During Casting

Ferrocon Tundish Board After Casting

Ferrocon Tundish Board After Deskulling

Dry Vibratable Working Lining - Fillmix Series

FILLMIX 85T is a magnesite based moldable water-free mix for tundish coating.

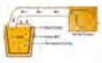
Fillmix 85T is easily filled between the permanent layer of tundish and the steel former.

The former is heated up to 250 °C by a drier unit supplying hot air circulation inside the former for 1 or 1.5 hours, and then removed by crane.

Fillmix 85T is formed at designed thickness. High density Fillmix 85T performs at long sequence lengths more than 24 hours and protects the quality of your steel.

Deskulling is a safe and quick process with Fillmix 85T, reducing downtime and lowering maintenance costs. Fillmix 85T can be used in both cold and hot tundish practices.

Fillmix 85 in Application



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Tundish Castables - Ferrocast Series

FERROCAST Tundish Permanent Lining Package:

Asmas has complete facilities and thorough experience for offering tundish permant lining package. The total package includes Ferrocast castables for permanent lining, insulation lining, anchor bolts, as well as, the necessary equipment and machinery for installation, such as the template, vibrators, and material mixer. Supervision and application can be provided, if it is required.

The Ferrocast tundish package becomes steelmakers' number one choice to install their tundishes at the plant start-up phases. The Ferrocast tundish package is available for single tundish reline to complete tundishes new lining.

FERROCAST is a low cement vibratable castable, uniquely designed for permanent lining of tundishes. Alumina content can be adjustable between 60 to 85 percent to match customer needs. Ferrocast's excellent physical and chemical properties and its resistance to thermal shocks provide a safe and long lasting lining for tundishes.

Tundish Furnitures and Shapes - Caston Series

CASTON tundish shapes are designed in specific shapes and manufactured in magnesite, alumina or alumina spinel qualities according to tundish requirements.

Target boxes, delta box, impact pads, dams, weirs, baffles, nozzle cones, well blocks are manufactured with superior physical and chemical properties for safe casting and clean steel production.

Precast shapes, when combined with Ferrocon wear lining, exhibits an outstanding performance for tundish long sequences and contributes to steel cleanliness for any steel grade production.

Ready to use tundish lids are a new approach to tundish covers with precise production including molding, casting and drying. Durable tundish lids are manufactured to withstand mechanical and thermal stresses during operation.

Impact Pad

Tundish Box/Delta Box

Tundish Lid

Baffle

Precast Shape ULC Castable

http://www.mineralstech.com/Pages/Mintag/Asmas-Tundish-Refractories.aspx 02/10/2015 08:31:01 AM

Isostatic Refractories - Ferroflow Series

Asmas has recently developed its own Isostatic Refractory Technology for Tundish flow protection and control applications. Asmas is still the sole supplier of isostatic refractory products in Turkey and uses the FERROFLOW brand name for its product series.

Isostatic pressing of carbon bonded refractory oxides is a technology that allows complex designs in refractories for some special applications. These special applications are mostly classified in two main groups, such as protection of the stream, and controlling the liquid steel flow from tundish to mold. The FERROFLOW products are widely used for quality steels by slab and alloy steelmakers.

Ladle Shroud (LS), is used for the protection of the steel stream from ladle to tundish. The connection of LS is done to the collector nozzle of the Ladle Slide Gate with the help of a manipulator. The LS has a submerged entry to the steel bath in theTundish. Primarily, LS application will prevent the re-oxidation of the steel, reduce the Nitrogen pickup, improve steel cleanliness and create a safer environment by eliminating splashing. There are also some secondary benefits, such as less consumption of the tundish covering compound, less tundish heat loss and less radiation from Tundish to Ladle.

Stopper Rod (SR), is used to control the steel flow from the Tundish to the Mold. The SR is fixed into the Tundish on the casting stand with the help of a steel rod, fixed into the SR, and connected to manipulator arm, which can control the SR with upward-downward movements. The SR control mechanisms can be manual-controlled or automatic-driven. The SR sits on the seat area of either a Tundish Nozzle (TN) or a Submerged Nozzle (SN), which are both casting channels out from the tundish. Under the TN, a type Tundish Shroud (TS) has to be used. The TN to TS connection can be done with various possible methods, such as either direct refractory conical connection or with the help of an exchange mechanism. Depending on the connection method, TS may have different sizes and connections from the TN to the mold. Several models are designed according to customer needs. The SN is a long, one- piece solution to allow the submerged flow directly into the mold from the Tundish.

Please contact Asmas engineers or specialists for investigating suitable design and quality for your applications.

Product Range:

- Ferroflow LS – Ladle Shroud
- Ferroflow SR – Stopper Rod
- Ferroflow TN – Tundish Nozzle
- Ferroflow TS – Tundish Shroud
- Ferroflow SN – Submerged Nozzle

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IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

Application Serial No.:	77873477
Application Filing Date:	November 16, 2009
Mark:	MAGNESITA
Owner/Appellant:	Magnesita Refractories Company
Attorney's Reference:	MAGN6002/TJM

APPLICANT'S BRIEF

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March 30, 2015

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APPLICANT'S BRIEF
U.S. Application No. 77873477

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APPLICANT'S BRIEF
U.S. Application No. 77873477

I. DESCRIPTION OF THE RECORD

The record is described by the Trademark Status and Document Retrieval ("TSDR") of the U.S. Patent and Trademark Office ("Office") as follows:

Date	Item
Feb. 26, 2015	NOTIFICATION OF ACTION DENYING REQ FOR RECON E-MAILED
Feb. 26, 2015	ACTION DENYING REQ FOR RECON E-MAILED
Feb. 26, 2015	ACTION CONTINUING FINAL - COMPLETED
Jan. 13, 2015	EX PARTE APPEAL-INSTITUTED
Jan. 13, 2015	JURISDICTION RESTORED TO EXAMINING ATTORNEY
Jan. 13, 2015	EXPARTE APPEAL RECEIVED AT TTAB
Dec. 18, 2014	TEAS/EMAIL CORRESPONDENCE ENTERED
Dec. 17, 2014	CORRESPONDENCE RECEIVED IN LAW OFFICE
Dec. 17, 2014	TEAS REQUEST FOR RECONSIDERATION RECEIVED
Jul. 18, 2014	NOTIFICATION OF FINAL REFUSAL EMAILED
Jul. 18, 2014	FINAL REFUSAL E-MAILED
Jul. 18, 2014	FINAL REFUSAL WRITTEN
Jun. 04, 2014	TEAS/EMAIL CORRESPONDENCE ENTERED
Jun. 04, 2014	CORRESPONDENCE RECEIVED IN LAW OFFICE
Jun. 04, 2014	TEAS RESPONSE TO OFFICE ACTION RECEIVED
May 27, 2014	NOTIFICATION OF NON-FINAL ACTION E-MAILED
May 27, 2014	NON-FINAL ACTION E-MAILED
May 27, 2014	NON-FINAL ACTION WRITTEN
Apr. 11, 2014	TEAS/EMAIL CORRESPONDENCE ENTERED
Apr. 11, 2014	CORRESPONDENCE RECEIVED IN LAW OFFICE

Date	Item
Mar. 29, 2014	TEAS REQUEST FOR RECONSIDERATION RECEIVED
Mar. 27, 2014	NOTIFICATION FOR REQ FOR RECON DENIED NO APPEAL FILED
Mar. 27, 2014	ACTION FOR REQ FOR RECON DENIED NO APPEAL FILED E-MAILED
Mar. 27, 2014	ACTION REQ FOR RECON DENIED NO APPEAL FILED COUNTED NOT MAILED
Mar. 15, 2014	TEAS/EMAIL CORRESPONDENCE ENTERED
Mar. 14, 2014	CORRESPONDENCE RECEIVED IN LAW OFFICE
Mar. 14, 2014	TEAS REQUEST FOR RECONSIDERATION RECEIVED
Oct. 04, 2013	NOTIFICATION OF FINAL REFUSAL EMAILED
Oct. 04, 2013	FINAL REFUSAL E-MAILED
Oct. 04, 2013	FINAL REFUSAL WRITTEN
Oct. 03, 2013	TEAS/EMAIL CORRESPONDENCE ENTERED
Oct. 03, 2013	CORRESPONDENCE RECEIVED IN LAW OFFICE
Sep. 30, 2013	TEAS VOLUNTARY AMENDMENT RECEIVED
Sep. 20, 2013	TEAS/EMAIL CORRESPONDENCE ENTERED
Sep. 20, 2013	CORRESPONDENCE RECEIVED IN LAW OFFICE
Sep. 20, 2013	TEAS RESPONSE TO OFFICE ACTION RECEIVED
Mar. 28, 2013	NOTIFICATION OF NON-FINAL ACTION E-MAILED
Mar. 28, 2013	NON-FINAL ACTION E-MAILED
Mar. 28, 2013	NON-FINAL ACTION WRITTEN
Feb. 22, 2013	TEAS/EMAIL CORRESPONDENCE ENTERED
Feb. 22, 2013	CORRESPONDENCE RECEIVED IN LAW OFFICE
Feb. 22, 2013	TEAS REQUEST FOR RECONSIDERATION RECEIVED

Date	Item
Aug. 28, 2012	NOTIFICATION OF FINAL REFUSAL EMAILED
Aug. 28, 2012	FINAL REFUSAL E-MAILED
Aug. 28, 2012	FINAL REFUSAL WRITTEN
Jul. 27, 2012	TEAS/EMAIL CORRESPONDENCE ENTERED
Jul. 26, 2012	CORRESPONDENCE RECEIVED IN LAW OFFICE
Jul. 26, 2012	TEAS RESPONSE TO OFFICE ACTION RECEIVED
Feb. 01, 2012	NOTIFICATION OF NON-FINAL ACTION E-MAILED
Feb. 01, 2012	NON-FINAL ACTION E-MAILED
Feb. 01, 2012	NON-FINAL ACTION WRITTEN
Jan. 12, 2012	TEAS/EMAIL CORRESPONDENCE ENTERED
Jan. 12, 2012	CORRESPONDENCE RECEIVED IN LAW OFFICE
Jan. 12, 2012	TEAS REQUEST FOR RECONSIDERATION RECEIVED
Jan. 09, 2012	NOTIFICATION OF SUBSEQUENT FINAL EMAILED
Jan. 09, 2012	SUBSEQUENT FINAL EMAILED
Jan. 09, 2012	SUBSEQUENT FINAL REFUSAL WRITTEN
Dec. 16, 2011	TEAS/EMAIL CORRESPONDENCE ENTERED
Dec. 15, 2011	CORRESPONDENCE RECEIVED IN LAW OFFICE
Dec. 15, 2011	TEAS RESPONSE TO OFFICE ACTION RECEIVED
Jun. 24, 2011	NOTICE OF ACCEPTANCE OF AMENDMENT TO ALLEGE USE E-MAILED
Jun. 23, 2011	NOTIFICATION OF NON-FINAL ACTION E-MAILED
Jun. 23, 2011	NON-FINAL ACTION E-MAILED
Jun. 23, 2011	USE AMENDMENT ACCEPTED

Date	Item
Jun. 23, 2011	NON-FINAL ACTION WRITTEN
Jun. 20, 2011	AMENDMENT TO USE PROCESSING COMPLETE
Jun. 13, 2011	USE AMENDMENT FILED
Jun. 13, 2011	TEAS AMENDMENT OF USE RECEIVED
Jun. 13, 2011	TEAS/EMAIL CORRESPONDENCE ENTERED
Jun. 13, 2011	CORRESPONDENCE RECEIVED IN LAW OFFICE
Jun. 13, 2011	TEAS REQUEST FOR RECONSIDERATION RECEIVED
May 27, 2011	NOTIFICATION OF FINAL REFUSAL EMAILED
May 27, 2011	FINAL REFUSAL E-MAILED
May 27, 2011	FINAL REFUSAL WRITTEN
Apr. 29, 2011	TEAS/EMAIL CORRESPONDENCE ENTERED
Apr. 29, 2011	CORRESPONDENCE RECEIVED IN LAW OFFICE
Apr. 29, 2011	TEAS RESPONSE TO OFFICE ACTION RECEIVED
Nov. 05, 2010	NOTIFICATION OF NON-FINAL ACTION E-MAILED
Nov. 05, 2010	NON-FINAL ACTION E-MAILED
Nov. 05, 2010	NON-FINAL ACTION WRITTEN
Sep. 27, 2010	TEAS/EMAIL CORRESPONDENCE ENTERED
Sep. 27, 2010	CORRESPONDENCE RECEIVED IN LAW OFFICE
Sep. 27, 2010	TEAS RESPONSE TO OFFICE ACTION RECEIVED
Mar. 30, 2010	NOTIFICATION OF NON-FINAL ACTION E-MAILED
Mar. 30, 2010	NON-FINAL ACTION E-MAILED
Mar. 30, 2010	NON-FINAL ACTION WRITTEN
Mar. 30, 2010	PREVIOUS ALLOWANCE COUNT WITHDRAWN

Date	Item
Mar. 30, 2010	APPROVED FOR PUB - PRINCIPAL REGISTER
Mar. 30, 2010	EXAMINER'S AMENDMENT ENTERED
Mar. 30, 2010	NOTIFICATION OF EXAMINERS AMENDMENT E-MAILED
Mar. 30, 2010	EXAMINERS AMENDMENT E-MAILED
Mar. 30, 2010	EXAMINERS AMENDMENT -WRITTEN
Mar. 26, 2010	TEAS/EMAIL CORRESPONDENCE ENTERED
Mar. 26, 2010	CORRESPONDENCE RECEIVED IN LAW OFFICE
Mar. 25, 2010	ASSIGNED TO LIE
Mar. 24, 2010	AUTOMATIC UPDATE OF ASSIGNMENT OF OWNERSHIP
Mar. 18, 2010	TEAS RESPONSE TO OFFICE ACTION RECEIVED
Feb. 22, 2010	NOTIFICATION OF NON-FINAL ACTION E-MAILED
Feb. 22, 2010	NON-FINAL ACTION E-MAILED
Feb. 22, 2010	NON-FINAL ACTION WRITTEN
Feb. 22, 2010	ASSIGNED TO EXAMINER
Nov. 20, 2009	NEW APPLICATION OFFICE SUPPLIED DATA ENTERED IN TRAM
Nov. 19, 2009	NEW APPLICATION ENTERED IN TRAM

II. STATEMENT OF THE ISSUE

Whether the final Office Action dated July 18, 2014, is correct in asserting that the present mark MAGNESITA (word without design or stylization) is generic with respect to the goods:

> Class 19: Refractory products not made primarily of metal, namely, refractory bricks, refractory mixes for patching, lining or repairing high temperature apparatus and repairing the lining for furnaces, refractory furnace patching and repair mixes.

The Office has conceded that the mark MAGNESITA (word without design or stylization) is not generic for the services:

> Class 37: Providing information via a global computer network on constructing, maintaining, and repairing refractory apparatus using refractory products.

The Office Action dated May 27, 2014, expressly states that the "amendment to the Supplemental Register is acceptable for the services named in International Class 37."

III. RECITATION OF THE FACTS

The Declaration About Generic Terms on Web Pages filed on December 17, 2014, states as follows:

1. All statements made herein of my own knowledge are true, and all statements made on information and belief are believed to be true.
2. I have conducted searches on the Internet for web pages that offer refractory products for sale in the United States.
3. The attached exhibits are based on these searches, and accurately reflect the web page at the address at the top, and at the date and time shown at the lower right of each exhibit.
4. The attached Exhibit A shows at least the top of a web page at the alliedmineral.com website. Allied Mineral Products appears to market refractory products. I reviewed at least a portion of the website

and observed use of the generic terms “castable refractories,” and “precast refractory shapes.” I did not observe any use of the term “magnesita” at this website.

5. The attached Exhibit B shows an image of a search for “magnesita” at the alliedmineral.com website.
6. The attached Exhibit C shows at least the top of a web page at the zircoa.com website. Zircoa appears to market refractory products. I reviewed at least a portion of the website and observed use of the generic term "refractory brick." I did not observe any use of the term "magnesita" at this website.
7. The attached Exhibit D shows at least the top of a web page at the bnzmaterials.com website. BNZ Materials, Inc. appears to market refractory products. I reviewed at least a portion of the website and observed use of the generic term "insulating firebrick." I did not observe any use of the term "magnesita" at this website.
8. The attached Exhibit E shows at least the top of a web page at the ssfbs.com website. Smith-Sharpe Fire Brick Supply appears to market refractory products. I reviewed at least a portion of the website and observed use of the generic term "fire brick." I did not observe any use of the term "magnesita" at this website.
9. The attached Exhibit F shows at least the top of a web page at the alsey.com website. Alsey refractories co. appears to market refractory products. I reviewed at least a portion of the website and observed use of the generic terms "firebrick," “mortar” and “castable.” I did not observe any use of the term "magnesita" at this website.
10. The attached Exhibit G shows at least the top of a web page at the heatstoprefractorymortar.com website. Heat Stop appears to market refractory products. I reviewed at least a portion of the website and observed use of the generic terms “refractory mortar” and "firebrick." I did not observe any use of the term "magnesita" at this website.
11. The attached Exhibit H shows at least the top of a web page at the axner.com website. Axner appears to market refractory products. I reviewed at least a portion of the website and observed use of the

generic terms “refractory brick” and "firebrick." I did not observe any use of the term "magnesita" at this website.

12. The attached Exhibit I shows at least the top of a web page at the firebrickengineers.com website. Fire Brick Engineers Company appears to market refractory products. I reviewed at least a portion of the website and observed use of the generic terms “refractory products” and "fire brick." I did not observe any use of the term "magnesita" at this website.
13. The attached Exhibit J shows at least the top of a web page at the morganthermalceramics.com website. Morgan Advanced Materials appears to market refractory products. I reviewed at least a portion of the website and observed use of the generic terms “fire brick,” and “firebrick.” I did not observe any use of the term “magnesita” at this website.
14. The attached Exhibit K shows an image of a search for “magnesita” at the morganthermalceramics.com website.
15. The attached Exhibit L shows at least the top of a web page at the ortonceramic.com website. Orton to market testing of refractory products. I reviewed at least a portion of the website and observed use of the generic terms “refractory shapes,” “refractory brick” and “refractory materials.” I did not observe any use of the term “magnesita” at this website.
16. The attached Exhibit M shows at least the top of a web page at the tflhouston.com website. TFL Incorporated appears to market refractory products. I reviewed at least a portion of the website and observed use of the generic terms “firebrick,” and “refractories.” I did not observe any use of the term “magnesita” at this website.
17. The attached Exhibit N shows an image of a search for “magnesita” at the tflhouston.com website.
18. The attached Exhibit O shows at least the top of a web page at the hitempincusa.com website. Hi Temp Refractories to market refractory products. I reviewed at least a portion of the website and

observed use of the generic terms "firebrick," and "castables." I did not observe any use of the term "magnesita" at this website.

19. The attached Exhibit P shows at least the top of a web page at the louisvillefirebrick.com website. Louisville Firebrick appears to market refractory products. I reviewed at least a portion of the website and observed use of the generic terms "firebrick," and "refractory brick." I did not observe any use of the term "magnesita" at this website.
20. The attached Exhibit Q shows at least the top of a web page at the kandg.net website. K&G Industrial Services appears to market the installation of refractory products. I reviewed at least a portion of the website and observed use of the generic term "refractory brick." I did not observe any use of the term "magnesita" at this website.
21. The attached Exhibit R shows at least the top of a web page at the firebricks.com website. Firebricks appears to market refractory products. I reviewed at least a portion of the website and observed use of the generic term "refractory bricks." I did not observe any use of the term "magnesita" at this website.
22. The attached Exhibit S shows at least the top of a web page at the elginbutler.com website. Elgin Butler appears to market refractory products. I reviewed at least a portion of the website and observed use of the generic term "fire brick." I did not observe any use of the term "magnesita" at this website.
23. The attached Exhibit T shows at least the top of a web page at the larkinrefractory.com website. Larkin Refractory Solutions appears to market refractory products. I reviewed at least a portion of the website and observed use of the generic term "fire brick." I did not observe any use of the term "magnesita" at this website.
24. The attached Exhibit U shows at least the top of the Terminology page at the larkinrefractory.com website. I observed use of the generic term "fire brick." I did not observe any use of the term "magnesita" at this website.

25. The attached Exhibit V shows at least the top of a web page at the vitcas.com website. Vitcas appears to market refractory products. I reviewed at least a portion of the website and observed use of the generic terms “fire brick,” and “firebrick.” I did not observe any use of the term “magnesita” at this website.

26. The attached Exhibit W shows an image of a search for “magnesita” at the vitcas.com website.

27. The attached Exhibit X shows at least the top of a web page at the nockrefractories.com website. The Nock Refractories Company appears to market refractory products. I reviewed at least a portion of the website and observed use of the generic term “fire brick.” I did not observe any use of the term “magnesita” at this website.

28. The attached Exhibit Y shows at least the top of a web page at the nwironworks.com website. The Northwest Iron Works appears to market refractory products. I reviewed at least a portion of the website and observed use of the generic term “fire brick.” I did not observe any use of the term “magnesita” at this website.

29. The attached Exhibit Z shows at least the top of a web page at the miamistoneinstallers.com website. Miami Stone Installers.com appears to market refractory products. I reviewed at least a portion of the website and observed use of the generic terms “firebrick” and “fire brick.” I did not observe any use of the term “magnesita” at this website.

30. The attached Exhibit AA shows at least the top of a page at the lowes.com website. Lowe’s appears to market refractory products. I reviewed at least a portion of the website and observed use of the generic term "firebrick." I did not observe any use of the term "magnesita" at this website.

31. The attached Exhibit AB shows at least the top of a page at the homedepot.com website. The Home Depot appears to market refractory products. I reviewed at least a portion of the website and observed use of the generic term "fire bricks." I did not observe any use of the term "magnesita" at this website.

32. The attached Exhibit AC shows at least the top of a page at the walmart.com website. Walmart appears to market refractory products. I reviewed at least a portion of the website and observed use of the generic terms “fire brick” and "firebrick." I did not observe any use of the term "magnesita" at this website.
33. The attached Exhibit AD shows an image of a search for “magnesita” at the walmart.com website.
34. The attached Exhibit AE shows at least the top of a page at the amazon.com website. Amazon appears to market refractory products. I reviewed at least a portion of the website and observed use of the generic terms “fire brick” and "firebrick." I did not observe any use of the term "magnesita" at this website.
35. The attached Exhibit AF shows at least the top of a page at the rescoproducts.com website. RESCO Products, Inc. appears to market refractory products. I reviewed at least a portion of the website and observed use of the generic term “brick." I did not observe any use of the term "magnesita" at this website.
36. The attached Exhibit AG shows at least the top of a page at the vesuvius.com website. Vesuvius appears to market refractory products. I reviewed at least a portion of the website and observed use of the generic term “brick." I did not observe any use of the term "magnesita" at this website.
37. The attached Exhibit AH shows at least the top of a page at the rhi-ag.com website. RHI appears to market refractory products. I reviewed at least a portion of the website and observed use of the generic term “brick." I did not observe any use of the term "magnesita" at this website.
38. The attached Exhibit AI shows at least the top of a page at the hwr.com website. ANH Refractories appears to market refractory products. I reviewed at least a portion of the website and observed use of the generic term “brick." I did not observe any use of the term "magnesita" at this website.

39. The attached Exhibit AJ shows at least the top of a page at the mineralstech.com website. Minerals Technology to market refractory products. I reviewed at least a portion of the website and observed use of the generic term “brick." I did not observe any use of the term "magnesita" at this website.

The Declaration of Change of Name filed March 14, 2014, states as follows:

The attached Exhibit A is copy of the change of name of Applicant from LWB Refractories Company to Magnesita Refractories Company signed on November 20, 2009, and filed with the Corporation Bureau of the Pennsylvania Department of State on November 30, 2009.

The Declaration of Gross Sales filed March 14, 2014, states as follows:

The gross sales of refractory products under the trademark MAGNESITA from May 1 to December 31, 2010 were in excess of 280,000 metric tons and US $103,000,000 for domestic production.

The gross sales of refractory products under the trademark MAGNESITA from January 1 to December 31, 2011 were in excess of 440,000 metric tons and US $200,000,000 for domestic production.

The gross sales of refractory products under the trademark MAGNESITA from January 1 to December 31, 2012 were in excess of 500,000 metric tons and US $200,000,000 for domestic production.

IV. ARGUMENT

A. THE STANDARD OF REVIEW.

In ex parte cases, the question is simply "whether or not, based on the record before the examiner, the examiner's action was correct." *In re Bose Corp.*, 772 F.2d 866, 869, 227 USPQ 1 (Fed. Cir. 1985). See also *In re AFG Industries, Inc.*, 17 U.S.P.Q.2d 1162 (TTAB 1990) (In determining an ex parte appeal, the Appeal Board's sole task is "to determine if the refusal to register was correctly made." *Id.* at 1163).

B. THE EXAMINING ATTORNEY HAS NOT ESTABLISHED CLEAR EVIDENCE TO SHOW GENERICNESS OF THE MARK.

The present refusal is based on the statutory provision that requires the mark to be "capable of distinguishing the applicant's goods and services." 15 U.S.C. §1091(c) (2005). In view of such statute, the Patent and Trademark Office (PTO) has indicated that generic terms are "incapable of functioning as registrable trademarks denoting source, and are not registrable on the Principal Register under §2(f) or on the Supplemental Register." (TMEP § 1209.01(c)).

In proving genericness, the Office has the difficult burden of proving the refusal with "clear evidence" of genericness. *In re Interfashion U.S.A., Inc.*, 2006 WL 3147914 * 2 (TTAB 2006) (non-precedential) (*citing In re Merrill, Lynch, Pierce, Fenner & Smith, Inc.*, 828 F.2d 1567, 4 USPQ2d 1141, 1143 (Fed. Cir. 1987)); *see also In re Steelbuilding.com*, 415 F.3d 1293, 1296, 75 USPQ2d 1420 (Fed. Cir. 2005). The critical issue in genericness cases is whether members of the relevant public primarily use or understand the term sought to be registered to refer to the genus or category of goods in question. *In re Interfashion U.S.A., Inc.*, 2006 WL 3147914 * 3 (*citing H. Marvin Ginn Corp. v. International Ass'n* *of Fire Chiefs, Inc.*, 782 F.2d 987, 228 USPQ 528 (Fed. Cir. 1986)). In making this determination, courts follow the following two-step inquiry: 1) What is the genus or category of good or services at issue? and 2) Is the designation sought to be registered understood by the relevant public primarily to refer to that genus or category of goods or services? *H. Marvin Ginn Corp.*, 782 F.2d 987, 228 USPQ 528. Doubt on the issue of genericness is resolved in favor of the applicant. *In re Interfashion U.S.A., Inc.*, 2006 WL 3147914 * 3 (*citing In re Waverly Inc.*, 27 USPQ2d 1620, 1624 (TTAB 1993)). In this case, Applicant submits that the Examiner has failed to establish by clear evidence that the mark "MAGNESITA" is understood by the relevant public to be generic by primarily referring to the class of goods at issue, i.e., refractory products not made primarily of metal.

1. THE CATEGORY OF THE GOODS AT ISSUE IS REFRACTORY PRODUCTS.

In determining the first step of genericness, Applicant submits that the category of goods at issue is refractory products. Specifically, as amended in the response filed September 20, 2013 and suggested by the Examining Attorney in the Denial of the Request for Reconsideration of February 26, 2015, the goods are "Refractory products not made primarily of metal, namely, refractory bricks, refractory mixes for patching, lining or repairing high temperature apparatus and repairing the lining for furnaces, refractory furnace patching and repair mix."

2. THE RELEVANT PUBLIC WOULD NOT UNDERSTAND THE WORD "MAGNESITA" TO REFER TO REFRACTORY PRODUCTS.

The Examining Attorney has failed to properly identify the relevant public and provide clear evidence that the relevant public *primarily* refers to refractory products by the present mark. In determining the second step of the genericness determination, the court must identify the relevant public by identifying who actually or potentially purchases or consumes the goods, and whether members of the relevant public primarily use or understand the term sought to be protected to refer to the genus of goods or services in question. *See H. Marvin Ginn Corp.*, 782 F.2d at 989; *Magic Wand, Inc. v. RDB, Inc.*, 940 F.2d 638, 641, 19 USPQ2d 1552 (Fed. Cir. 1991); *see also* TMEP § 1209.01(c). In this case, the Examining Attorney has not established that the relevant public would have understood the mark "MAGNESITA" as primarily referring to refractory products.

Although the Examining Attorney suggests in the Final Action of July 18, 2014 that the relevant public are people who work in the refractory industry and purchase refractory products on a regular basis, the Examining Attorney has not provided clear evidence to support this conclusion. Rather, as discussed in the Request for Reconsideration filed December 17, 2014, Applicant submits that the relevant public is not the narrow field of people who work in the refractory industry and purchase refractory products on a regular basis, but rather the general public. Specifically, since the relevant public for a genericness determination is the ***actual or potential purchaser*** of the goods, the relevant public in this case is any actual or potential purchaser of refractory products, which in this case is the general public. *See Magic Wand, Inc.*, 940 F.2d at 641. For example, as seen in Exhibits AA to EE, to the Declaration About Generic Terms on Web Pages, the refractory products are sold by the well-known retailers Lowe's, Home Depot, Walmart, and Amazon to the general public (Dec. ¶ 30-34). Therefore, as is clear from the plain reading of the identification of goods in Class 19, the refractory products are not limited to a particular group of customers, but to any ***actual or potential purchaser*** of "[r]efractory products not made primarily of metal, namely, refractory bricks, refractory mixes for patching, lining or repairing high temperature apparatus and repairing the lining of furnaces, refractory furnace patching and repair mixes." In other words, since any doubt on the issue of genericness is resolved in favor of the applicant, Applicant submits that the relevant public in this genericness determination is the general public, since the general public actually or potentially purchases the refractory products. *See In re Interfashion U.S.A., Inc.*, 2006 WL 3147914 * 3.

Next, although the Examining Attorney suggests that since magnesia and magnesite may be used in the goods, the ingredient may be generic for the goods, Applicant submits that the test for genericness is not whether any ingredient may be generic for those goods, but rather, whether the relevant public would *primarily* use or understand the term sought to be protected to refer to the genus of goods in question. *See H. Marvin Ginn Corp.*, 782 F.2d at 991.

In *H. Marvin Ginn Corp.*, the registrar registered the mark to "a magazine directed to the field of fire fighting." *H. Marvin Ginn Corp.*, 782 F.2d at 991. The Federal Circuit indicated that it did not discern any record evidence which suggests "that the relevant portion of the public *refers* to a class of fire fighting publications as 'Fire Chief.'" *Id.* (emphasis added). Therefore, the Federal Circuit concluded that the TTAB clearly erred in finding the mark directed to the field of fire fighting to be generic. *Id.*

In the present appeal, not only has the Examining Attorney admitted in the Final Action of July 18, 2014, that "the public at large would not necessarily understand that the term MAGNESITA translates to magnesia or magnesite," the Examining Attorney has not provided record evidence to suggest that the term "MAGNESITA" *primarily refers* to the class of refractory product not made primarily of metal. Rather, as evidenced by Exhibits A to AJ filed with the Request for Reconsideration of December 17, 2014, the relevant public would have understood that the terms "fire brick" and "refractory brick" are generic terms directed to different goods in the cited class (Dec. ¶ 4-39). Applicant, however, does not observe and the Examining Attorney has not provided clear evidence that the relevant public would have understood the term "MAGNESITA" to be generic to *primarily refer* to refractory products.

Moreover, even assuming *arguendo* that the relevant public are people who work in the refractory industry and purchase refractory products, and that they would understand that the term "MAGNESITA" means magnesite or magnesia, Applicant submits that the Examining Attorney has not provided clear evidence to show that the relevant public used or would have understood the term "MAGNESITA" to *primarily refer* to refractory products.

Applicant submits that the present goods are not magnesia or magnesite, where magnesite has the chemical formula $MgCO_3$ and is used to produce magnesia having the chemical formula MgO. The present goods are "refractory products not made primarily of metal." While some of these refractory products may comprise magnesite, magnesite is a compound in Class 1 and not in Class 19. In other words, while magnesia and magnesite are generic terms to identify minerals, the Examining Attorney has not provided clear evidence to establish that magnesia and magnesite are generic terms to *primarily* identify refractory products. *See In re Interfashion U.S.A., Inc.*, 2006 WL 3147914 *3 ("The two references to "Oat Straw" hair care preparations which appear to be generic in nature do not constitute a clear or substantial showing of generic use.")

The Examining Attorney has not provided any evidence that the relevant public uses the term "MAGNESITA" to refer to the refractory brick or any refractory product. *See In re Minnetonka, Inc.*, 3 USPQ2d 1711, 1987 WL 124303 * 3 (TTAB 1987) ("This body of evidence is persuasive, and the Examining Attorney does not claim otherwise, to show that there exists a fairly substantial number of competitors in the business of selling liquid hand soap; that none of these competitors uses the term 'soft soap' descriptively, generically or otherwise in connection with its product.") At most, the Examining Attorney has established magnesia can be used as a component of the goods sold on various websites, e.g. refractory brick, lining, etc. For example, as seen in the Mt. Savage Firebrick Tech Data for Fireclay provided by the Examining Attorney on February 26, 2015, Fireclay has only 0.89% of MgO and is primarily composed of Silica (SiO_2) and Alumina (Al_2O_3) (at page 28 of the Office Action). Similarly, as seen in the printed web-page for Fire Brick Engineers Company, the refractory alumina brick has various concentrations of magnesia, but primarily contains alumina (at page 12 and following of the Office Action). What the Examining Attorney has failed to establish by clear evidence, however, is that the relevant public uses the terms magnesia or magnesite to *primarily refer* to the class of refractory product. *See In re Interfashion U.S.A., Inc.*, 2006 WL 3147914 *4 ("In this case, however, we are not convinced from the evidence of record that prospective purchasers would understand AVENA to refer to a principal or key ingredient in applicant's hair care preparations.") That is, Applicant does not observe the necessary clear evidence to establish that the relevant public uses the terms magnesia and magnesite, let alone the term "MAGNESITA," to *primarily refer* to the refractory brick or lining, i.e., the record lacks clear evidence that shows that the relevant public uses the terms magnesia or magnesite to *primarily refer* to the refractory brick or lining being sold.

Furthermore, Applicant submits that the meaning of "MAGNESITA" should be evaluated on the basis of the lack of definition from the Merriam-Webster Unabridged Dictionary (filed December 15, 2011) and not based on the translation, as suggested by the Examining Attorney. The use of a translation is inappropriate under, and unjustified, by current case law.

As discussed in the Request for Reconsideration filed December 17, 2014, the relevant public would have understood that the term "MAGNESITA" is not generic, as shown in Exhibits A to AJ to the "Declaration About Generic Terms on Web Pages," as stated above.

Applicant submits that the Examining Attorney has failed to establish by clear evidence that the relevant public uses the term "MAGNESITA" to *primarily refer* to refractory products and only has established that magnesia and magnesite can be used as a component of refractory brick or lining.

V. SUMMARY

Applicant respectfully submits that the application should be approved for registration because the mark "MAGNESITA" is not generic for the recited goods in the present application. Specifically, the term "MAGNESITA" is not understood by the relevant public, i.e., the general public, to *primarily* refer to the glass of goods at issue, i.e., refractory product not made primarily of metal... Moreover, the Examiner Attorney has not met the difficult burden to show the genericness of the mark "MAGNESITA" with respect to refractory products not made primarily of metal. Therefore, Applicant respectfully submits that the mark "MAGNESITA" is not generic and should be registered on the Supplemental Register.

Respectfully submitted,

/Thomas J. Moore/

Thomas J. Moore
Applicant's Attorney
Va. Bar Member

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Date: March 30, 2015

PTO Form 1960 (Rev 9/2007)
OMB No. 0651-0050 (Exp. 07/31/2017)

Request for Reconsideration after Final Action

The table below presents the data as entered.

Input Field	Entered
SERIAL NUMBER	85834316
LAW OFFICE ASSIGNED	LAW OFFICE 111
MARK SECTION	
MARK	http://tsdr.uspto.gov/img/85834316/large
LITERAL ELEMENT	MAGNESITA
STANDARD CHARACTERS	YES
USPTO-GENERATED IMAGE	YES
MARK STATEMENT	The mark consists of standard characters, without claim to any particular font style, size or color.
ARGUMENT(S)	
The final Office Action alleges that Applicant's evidence of acquired distinctiveness is insufficient. Applicant maintains that the evidence is in full compliance with the statute and regulations, but in order to expedite the application, submits herewith additional evidence. The Declaration About Exclusive Use reflects the review of numerous websites that market refractory products, and shows that "Magnesita" is not used by others. The Declaration of Gross Sales in 2014 states that the gross sales of refractory products in association with the trademark MAGNESITA were in excess of US$220,000,000 in 2014. The date of first use is amended to October, 2008. This is reflected by the attached Exhibit A, which is an article titled "Magnesita buys LWB" in the October, 2008, edition of Industrial Minerals. Applicant submits that the additional evidence of acquired distinctiveness is sufficient to approve the Section 2(f) claim. Applicant submits that the application should be approved for publication.	
EVIDENCE SECTION	
EVIDENCE FILE NAME(S)	
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DESCRIPTION OF EVIDENCE FILE	Exhibit A and Declarations
GOODS AND/OR SERVICES SECTION (019)(current)	
INTERNATIONAL CLASS	019
DESCRIPTION	
refractory products not primarily of metal, namely, refractory bricks, refractory mixes for patching, lining or repairing high temperature apparatus and repairing the lining for furnaces, refractory furnace patching and repair mixes; and pre-cast refractory shapes	
FILING BASIS	Section 1(a)
FIRST USE ANYWHERE DATE	At least as early as 10/01/2010
FIRST USE IN COMMERCE DATE	At least as early as 10/01/2010
GOODS AND/OR SERVICES SECTION (019)(proposed)	
INTERNATIONAL CLASS	019
DESCRIPTION	
refractory products not primarily of metal, namely, refractory bricks, refractory mixes for patching, lining or repairing high temperature apparatus and repairing the lining for furnaces, refractory furnace patching and repair mixes; and pre-cast refractory shapes	
FILING BASIS	Section 1(a)
FIRST USE ANYWHERE DATE	At least as early as 10/00/2008
FIRST USE IN COMMERCE DATE	At least as early as 10/00/2008
GOODS AND/OR SERVICES SECTION (037)(current)	
INTERNATIONAL CLASS	037
DESCRIPTION	
providing information via a global computer network on the use of refractory products to construct, maintain and repair refractory apparatus using refractory products; and providing information via a global computer network on the use of mechanical equipment and computer models to construct, maintain and repair refractory installations	
FILING BASIS	Section 1(a)
FIRST USE	At least as early as 10/01/2010

ANYWHERE DATE	
FIRST USE IN COMMERCE DATE	At least as early as 10/01/2010
GOODS AND/OR SERVICES SECTION (037)(proposed)	
INTERNATIONAL CLASS	037
DESCRIPTION	
providing information via a global computer network on the use of refractory products to construct, maintain and repair refractory apparatus using refractory products; and providing information via a global computer network on the use of mechanical equipment and computer models to construct, maintain and repair refractory installations	
FILING BASIS	Section 1(a)
FIRST USE ANYWHERE DATE	At least as early as 10/00/2008
FIRST USE IN COMMERCE DATE	At least as early as 10/00/2008
ADDITIONAL STATEMENTS SECTION	
SECTION 2(f) Claim of Acquired Distinctiveness, based on Five or More Years' Use	The mark has become distinctive of the goods/services through the applicant's substantially exclusive and continuous use in commerce that the U.S. Congress may lawfully regulate for at least the five years immediately before the date of this statement.
SIGNATURE SECTION	
DECLARATION SIGNATURE	/Thomas J. Moore/
SIGNATORY'S NAME	Thomas J. Moore
SIGNATORY'S POSITION	Owner's Attorney, Va. Bar Member
SIGNATORY'S PHONE NUMBER	703-683-0500 x137
DATE SIGNED	05/06/2015
RESPONSE SIGNATURE	/Thomas J. Moore/
SIGNATORY'S NAME	Thomas J. Moore
SIGNATORY'S POSITION	Owner's Attorney, Va. Bar Member
SIGNATORY'S PHONE NUMBER	703-683-0500 x137
DATE SIGNED	05/06/2015
AUTHORIZED SIGNATORY	YES
CONCURRENT APPEAL NOTICE FILED	NO
FILING INFORMATION SECTION	
SUBMIT DATE	Wed May 06 12:53:29 EDT 2015
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PTO Form 1960 (Rev 9/2007)
OMB No. 0651-0050 (Exp. 07/31/2017)

Request for Reconsideration after Final Action

To the Commissioner for Trademarks:

Application serial no. **85834316** MAGNESITA(Standard Characters, see http://tsdr.uspto.gov/img/85834316/large) has been amended as follows:

ARGUMENT(S)
In response to the substantive refusal(s), please note the following:

The final Office Action alleges that Applicant's evidence of acquired distinctiveness is insufficient. Applicant maintains that the evidence is in full compliance with the statute and regulations, but in order to expedite the application, submits herewith additional evidence.

The Declaration About Exclusive Use reflects the review of numerous websites that market refractory products, and shows that "Magnesita" is not used by others.

The Declaration of Gross Sales in 2014 states that the gross sales of refractory products in association with the trademark MAGNESITA were in excess of US$220,000,000 in 2014.

The date of first use is amended to October, 2008. This is reflected by the attached Exhibit A, which is an article titled "Magnesita buys LWB" in the October, 2008, edition of Industrial Minerals.

Applicant submits that the additional evidence of acquired distinctiveness is sufficient to approve the Section 2(f) claim.

Applicant submits that the application should be approved for publication.

EVIDENCE
Evidence in the nature of Exhibit A and Declarations has been attached.
Original PDF file:
evi_5024695157-20150506123346685270_._Oct._2008_article_Magnesita_buys_LWB_in_Industrial_Minerals.pdf
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Evidence-2
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Evidence-1
Evidence-2
Evidence-3
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Evidence-5
Evidence-6
Evidence-7
Evidence-8
Evidence-9
Evidence-10
Evidence-11
Evidence-12
Evidence-13
Evidence-14
Evidence-15

Evidence-16
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Evidence-2
Evidence-3
Evidence-4
Evidence-5
Evidence-6
Evidence-7
Evidence-8
Evidence-9
Evidence-10
Evidence-11
Evidence-12
Evidence-13
Evidence-14

CLASSIFICATION AND LISTING OF GOODS/SERVICES
Applicant proposes to amend the following class of goods/services in the application:
Current: Class 019 for refractory products not primarily of metal, namely, refractory bricks, refractory mixes for patching, lining or repairing high temperature apparatus and repairing the lining for furnaces, refractory furnace patching and repair mixes; and pre-cast refractory shapes
Original Filing Basis:
Filing Basis: Section 1(a), Use in Commerce: The applicant is using the mark in commerce, or the applicant's related company or licensee is using the mark in commerce, on or in connection with the identified goods and/or services. 15 U.S.C. Section 1051(a), as amended. The mark was first used at least as early as 10/01/2010 and first used in commerce at least as early as 10/01/2010 , and is now in use in such commerce.

Proposed: Class 019 for refractory products not primarily of metal, namely, refractory bricks, refractory mixes for patching, lining or repairing high temperature apparatus and repairing the lining for furnaces, refractory furnace patching and repair mixes; and pre-cast refractory shapes
Filing Basis: Section 1(a), Use in Commerce: The applicant is using the mark in commerce, or the applicant's related company or licensee is using the mark in commerce, on or in connection with the identified goods and/or services. 15 U.S.C. Section 1051(a), as amended. The mark was first used at least as early as 10/00/2008 and first used in commerce at least as early as 10/00/2008 , and is now in use in such commerce.
Applicant proposes to amend the following class of goods/services in the application:
Current: Class 037 for providing information via a global computer network on the use of refractory products to construct, maintain and repair refractory apparatus using refractory products; and providing information via a global computer network on the use of mechanical equipment and computer models to construct, maintain and repair refractory installations
Original Filing Basis:
Filing Basis: Section 1(a), Use in Commerce: The applicant is using the mark in commerce, or the applicant's related company or licensee is using the mark in commerce, on or in connection with the identified goods and/or services. 15 U.S.C. Section 1051(a), as amended. The mark was first used at least as early as 10/01/2010 and first used in commerce at least as early as 10/01/2010 , and is now in use in such commerce.

Proposed: Class 037 for providing information via a global computer network on the use of refractory products to construct, maintain and repair refractory apparatus using refractory products; and providing information via a global computer network on the use of mechanical equipment and computer models to construct, maintain and repair refractory installations

Filing Basis: Section 1(a), Use in Commerce: The applicant is using the mark in commerce, or the applicant's related company or licensee is using the mark in commerce, on or in connection with the identified goods and/or services. 15 U.S.C. Section 1051(a), as amended. The mark was first used at least as early as 10/00/2008 and first used in commerce at least as early as 10/00/2008 , and is now in use in such commerce.

ADDITIONAL STATEMENTS

SECTION 2(f) Claim of Acquired Distinctiveness, based on Five or More Years' Use

The mark has become distinctive of the goods/services through the applicant's substantially exclusive and continuous use in commerce that the U.S. Congress may lawfully regulate for at least the five years immediately before the date of this statement.

SIGNATURE(S)

Declaration Signature

DECLARATION: The signatory being warned that willful false statements and the like are punishable by fine or imprisonment, or both, under 18 U.S.C. Section 1001, and that such willful false statements and the like may jeopardize the validity of the application or submission or any registration resulting therefrom, declares that, if the applicant submitted the application or amendment to allege use (AAU) unsigned, all statements in the application or AAU and this submission based on the signatory's own knowledge are true, and all statements in the application or AAU and this submission made on information and belief are believed to be true.

STATEMENTS FOR UNSIGNED SECTION 1(a) APPLICATION/AAU: If the applicant filed an unsigned application under 15 U.S.C. Section 1051(a) or AAU under 15 U.S.C. Section 1051(c), the signatory additionally believes that: the applicant is the owner of the trademark/service mark sought to be registered; the applicant or the applicant's related company or licensee is using the mark in commerce and has been using the mark in commerce as of the filing date of the application or AAU on or in connection with the goods/services in the application or AAU, and such use by the applicant's related company or licensee inures to the benefit of the applicant; the original specimen(s), if applicable, shows the mark in use in commerce as of the filing date of the application or AAU on or in connection with the goods/services in the application or AAU; and to the best of the signatory's knowledge and belief, no other person has the right to use the mark in commerce, either in the identical form or in such near resemblance as to be likely, when used on or in connection with the goods/services of such other person, to cause confusion or mistake, or to deceive.

STATEMENTS FOR UNSIGNED SECTION 1(b)/SECTION 44 APPLICATION: If the applicant filed an unsigned application under 15 U.S.C. Section 1051(b), Section 1126(d), and/or Section 1126(e), the signatory additionally believes that: the applicant is entitled to use the mark in commerce; the applicant has a bona fide intention and has had a bona fide intention as of the application filing date to use or use through the applicant's related company or licensee the mark in commerce on or in connection with the goods/services in the application; and to the best of the signatory's knowledge and belief, no other person has the right to use the mark in commerce, either in the identical form or in such near resemblance as to be likely, when used on or in connection with the goods/services of such other person, to cause confusion or mistake, or to deceive.

Signature: /Thomas J. Moore/ Date: 05/06/2015
Signatory's Name: Thomas J. Moore
Signatory's Position: Owner's Attorney, Va. Bar Member
Signatory's Phone Number: 703-683-0500 x137

Request for Reconsideration Signature
Signature: /Thomas J. Moore/ Date: 05/06/2015
Signatory's Name: Thomas J. Moore
Signatory's Position: Owner's Attorney, Va. Bar Member

Signatory's Phone Number: 703-683-0500 x137

The signatory has confirmed that he/she is an attorney who is a member in good standing of the bar of the highest court of a U.S. state, which includes the District of Columbia, Puerto Rico, and other federal territories and possessions; and he/she is currently the applicant's attorney or an associate thereof; and to the best of his/her knowledge, if prior to his/her appointment another U.S. attorney or a Canadian attorney/agent not currently associated with his/her company/firm previously represented the applicant in this matter: (1) the applicant has filed or is concurrently filing a signed revocation of or substitute power of attorney with the USPTO; (2) the USPTO has granted the request of the prior representative to withdraw; (3) the applicant has filed a power of attorney appointing him/her in this matter; or (4) the applicant's appointed U.S. attorney or Canadian attorney/agent has filed a power of attorney appointing him/her as an associate attorney in this matter.

The applicant is not filing a Notice of Appeal in conjunction with this Request for Reconsideration.

Serial Number: 85834316
Internet Transmission Date: Wed May 06 12:53:29 EDT 2015
TEAS Stamp: USPTO/RFR-XX.XXX.XX.XXX-2015050612532982
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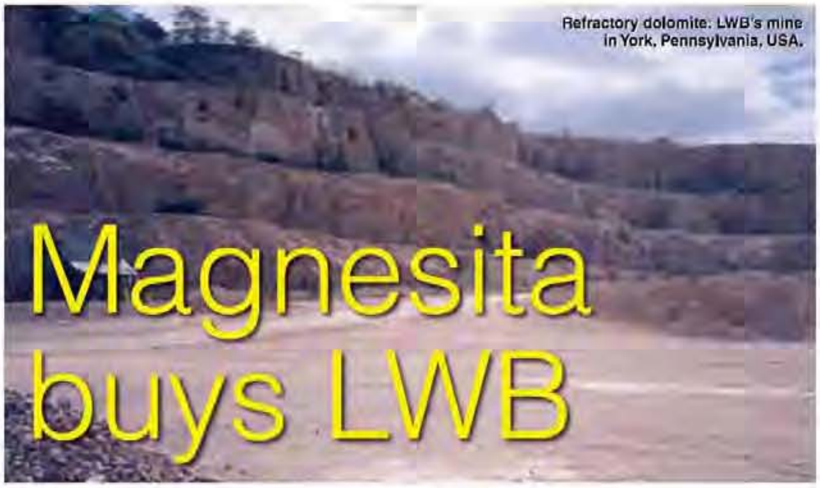


Refractory dolomite: LWB's mine in York, Pennsylvania, USA.

Magnesita buys LWB

Brazil's leading magnesite producer acquires German dolomite and refractories group, gaining a global customer base and raw material supply

by Kwok W Wan, *Assistant Editor*

LEADING BRAZILIAN MAGNESITE produc er, Magnesita Refratários SA, has acquired Germany based refractory dolomite producer, LWB Refractories GmbH, creating the third largest refractories group (by revenue) in the world, after Vesuvius and RHI AG (*see table*).

Magnesita's deal with Rhone Capital LLC, a private equity group with majority shareholdings in LWB, includes $392m. cash and Magnesita assuming a $538m. debt.

The move is seen as part of Magnesita's expansion plan to target customers outside its core market in South America to the global market, focusing on LWB's client base in China, Europe and the USA.

"This is a milestone in Magnesita's strategy to accelerate its international growth," said Ronaldo Iabrudi, chief executive officer of Magnesita.

In Brazil, Magnesita controls 70% of the steel refractories market and 80% of the cement refractories market, while the majority of LWB's sales are in Europe and the USA. Magnesita expects the acquisition of LWB will result in a wider spread of customers across a broad geographical base in South America, Europe, and the USA (*see chart*).

LWB leads world refractory dolomite production with an estimated 260-280,000 tpa combined capacity in Europe, sourcing dolomite raw material from mines in Belgium and Germany, and a further 150,000 tpa refractory dolomite from its York, Pennsylvania operation in the USA. It also runs a 55,000 tpa refractory dolomite plant in Chizhou, Anhui province, China.

"The LWB expansion gives us the opportunity for considerable growth in China, where we plan to double capacity of the existing LWB refractories plants to 180,000 tpa," said Iabrudi.

Magnesita also intends to increase magnesite production to meet demands in Asia.

Maurício Lustosa de Castro, chief financial officer of Magnesita, told **IM**: "To supply Asian clients with the amount of products they are demanding, we will have to make strong investments at Brumado mine [in north-east Brazil] in order to increase the production capacity currently at 320,000 tpa."

LWB has an overall refractory products manufacturing capacity of 700,000 tpa, with manufacturing facilities in China, France, Germany, and the USA. The total H1 2008 refractories output from both companies was 1.1m. tonnes.

No.1 by 2012

Magnesita believes the deal will have nearly no overlaps in terms of sales, but plenty of scope for raw material and upstream integrations.

"[There will be] no other company like ours in the refractory industry," said Castro, in a conference call.

According to Castro, LWB consumes 80-100,000 tpa of sintered or electro fused magnesite and accounts for 18% of sales, which Magnesita could now supply. Magnesita also manufactures dolomite products, so could now exploit LWB's raw material reserves in Europe and the USA.

Magnesita's upstream synergy plans could involve combining LWB's magnesite operations into Magnesita's Brazilian plants, while LWB facilities focus solely on dolomite products. It estimates synergies could save $35.5m. per annum.

The acquisition will also allow Magnesita to offer a range of magnesite and dolomite products to its combined customer base, including large clients currently supplied by LWB, but not by Magnesita and vice versa. These include LWB's long established relationships with stainless and carbon steel producers.

"[It's an] awesome opportunity for cross selling," said Castro.

Magnesita has set targets to be the largest refractories producer (by revenue) in the world by 2012. Domestic refractories demand is expected to be driven by the Brazilian steel industry, with steel demand predicted to grow by 13% this year according to the Brazilian Steel Institute.

Securing feedstock

The world's second largest refractories producer, Vienna based RHI, has also revealed intentions to expand via acquisitions, with focus on mineral producers.

"We have several projects under consideration," said Andreas Meier, RHI chief executive officer, adding: "A key area in this context is raw materials, not only magnesite and dolomite, but also bauxite and melting raw materials."

RHI and Tata Refractories Ltd have already announced magnesite projects in China, in an attempt to secure supplies (see p.8). Magnesita's acquisition of LWB is the

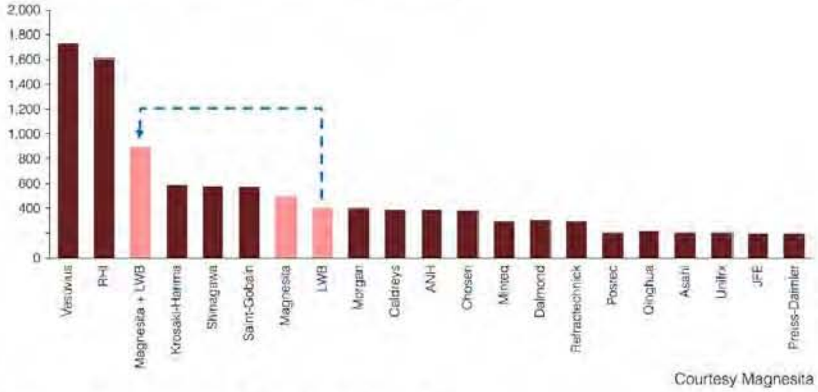
Brazilian's first foray into China in terms of raw materials.

Before this deal, Magnesita was recently secured by GP Investments Ltd (see *IM September '07, p.29*) and had announced plans to triple dead burned magnesia capacity (DBM; currently 320,000 tpa) and double refractories production (currently 590,000 tpa; see *IM September '08, p.28*).

DBM accounts for 10% of Magnesita's sales and the company believes demand is strong, representing a good opportunity. "Even if we see a slight slowdown in steel demand growth, refractories demand is still set for significant growth," said Iabrudi of Magnesia.

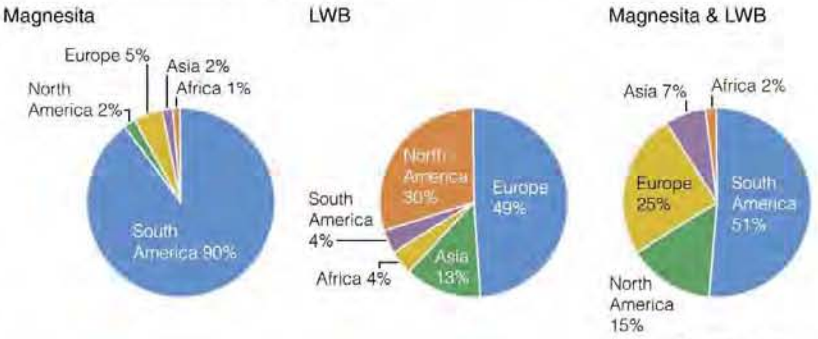
Supplies of magnesite have been tight as the world's leading producer, China, has used licences and quotas to reduce exports of the refractory mineral. This has lead to a raft of producers outside China announcing capacity expansions to meet demand (see *IM September '08, p.28*).

Top refractories companies by revenues (million euros)


2,000
1,800
1,600
1,400
1,200
1,000
800
600
400
0
Vesuvius
RHI
Magnesita + LWB
Krosaki-Harima
Shinagawa
Saint-Gobain
Magnesita
LWB
Morgan
Caldreys
ANH
Chosen
Minteq
Dalmond
Refratechnick
Posrec
Qinghua
Asahi
Unifrx
JFE
Preiss-Daimler

Courtesy Magnesita

Combined customer base of Magnesita and LWB


Magnesita
Europe 5%
Asia 2%
Africa 1%
North America 2%
South America 90%
LWB
North America 30%
Europe 49%
South America 4%
Africa 4%
Asia 13%
Magnesita & LWB
Asia 7%
Africa 2%
Europe 25%
South America 51%
North America 15%

Courtesy Magnesita

Companies in the News

20 Microns	14	DuPont	11	Noralf	17
Agrium	13	EDF	10	Nordic Mining ASA	11
Alcoa	17	Fluorsid	16	Potash Corp. of Saskatchewan	13
Alfluorco	17	Galaxy Resources Ltd	11	PricewaterhouseCoopers	24
Almatis	20	Gansu Kunlun	17	QB Industrias SAB de CV	16
American Iron & Steel Inst.	9	General Motors	11	RHI AG	6,8
Angang Steel Co.	33	Gulf Fluor	17	Rhone Capital	6
Artikol	25	Hunan Xiang Lv	17	Richards Bay Minerals	25
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Bemax Resources	25	Kaolin AD	12	Societes des Industries Chimique du Fluor	16
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Boliden Odda	16	Kenmare Resources	27	Steel Authority of India	8
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Buss Chem	17	LWB Refractories GmbH	6,8	Tata Group	11
Carnegie Minerals	25,27	Magnesita Refratarios SA	6,8	Tata Refractories Ltd	6,8
Casagrande Pisos Ceramicos	30	Mosa Uranium Corp.	13	Tata Steel	8
Ceramica Atlas	30	Metorex	17	Tertiary Minerals	20
Ceramica Batistella Ltda	30	Minerals Corp. Ltd	12	Titanium Resources Group	11,27
Ceusa-Ceramica Urussanga	30	Minmet Financing Co.	16	TRU Group	11
Chemetall	11	Mitsubishi Corp.	10	USGS	25
China Gengsheng Minerals	33	Monto Minerals	24	Vergenoeg Mining Co.	17
China National Offshore Oil Corp.	34	Mosaic	13	Western Potash Corp.	13
China National Petroleum Corp.	34	Mountain Capital Inc.	13	Whitemud Resources	12
China Petroleum and Chemical Corp.	34	National Titanium Dioxide Co.	25	Wolkem	14
Consolidated Rutile Ltd	27	New World Resource	10	Xinyu Abrasives Co. Ltd	33
Derivados des Fluor	17	Nitro Quimica Brasileira	17	Zibo Nanhan Fluoride	17
DFD Chemical Co.	17				

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE

Application Serial No.:	**85834316**
Application Filing Date:	January 28, 2013
Mark:	MAGNESITA
Applicant:	Magnesita Refractories Company
Attorney Ref:	MAGN6029/TJM

DECLARATION OF GROSS SALES IN 2014

Commissioner for Trademarks
P.O. Box 1451
Alexandria, VA 22313-1451

Madam:

The undersigned, being hereby warned that willful false statements and the like are punishable by fine or imprisonment, or both, under 18 U.S.C. §1001, and may jeopardize the validity of the application or any registration resulting therefrom, declares that:

1. All statements made herein of my own knowledge are true, and all statements made on information and belief are believed to be true.
2. The gross sales of refractory products associated with the trademark MAGNESITA from January 1 to December 31, 2014 were in excess of US$220,000,000 for domestic production.

Respectfully signed,

Date: May 6, 2015

Kelly L. Myers
General Counsel

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE

Application Serial No.:	**85834316**
Application Filing Date:	January 28, 2013
Mark:	MAGNESITA
Applicant:	Magnesita Refractories Company
Attorney Ref:	MAGN6029/TJM

DECLARATION ABOUT EXCLUSIVE USE

Commissioner for Trademarks
P.O. Box 1451
Alexandria, VA 22313-1451

Madam:

The undersigned, being hereby warned that willful false statements and the like are punishable by fine or imprisonment, or both, under 18 U.S.C. §1001, and may jeopardize the validity of the application or any registration resulting therefrom, declares that:

1. All statements made herein of my own knowledge are true, and all statements made on information and belief are believed to be true.

2. I have conducted searches on the Internet for web pages that offer refractory products for sale in the United States.

3. The attached exhibits are based on these searches, and accurately reflect the web page at the address at the top, and at the date and time shown at the lower right of each exhibit.

DECLARATION ABOUT EXCLUSIVE USE
U.S. Application No. 85834316

4. The attached Exhibit A shows at least the top of a web page at the alliedmineral.com website. Allied Mineral Products appears to market refractory products. I reviewed at least a portion of the website and observed use of the generic terms "castable refractories," and "precast refractory shapes." I did not observe any use of the term "magnesita" at this website.

5. The attached Exhibit B shows an image of a search for "magnesita" at the alliedmineral.com website.

6. The attached Exhibit C shows at least the top of a web page at the zircoa.com website. Zircoa appears to market refractory products. I reviewed at least a portion of the website and observed use of the generic term "refractory brick." I did not observe any use of the term "magnesita" at this website.

7. The attached Exhibit D shows at least the top of a web page at the bnzmaterials.com website. BNZ Materials, Inc. appears to market refractory products. I reviewed at least a portion of the website and observed use of the generic term "insulating firebrick." I did not observe any use of the term "magnesita" at this website.

8. The attached Exhibit E shows at least the top of a web page at the ssfbs.com website. Smith-Sharpe Fire Brick Supply appears to market refractory products. I reviewed at least a portion of the website and observed use of the generic term "fire brick." I did not observe any use of the term "magnesita" at this website.

9. The attached Exhibit F shows at least the top of a web page at the alsey.com website. Alsey refractories co. appears to market refractory products. I reviewed at least a portion of the the

website and observed use of the generic terms "firebrick," "mortar" and "castable." I did not observe any use of the term "magnesita" at this website.

10. The attached Exhibit G shows at least the top of a web page at the heatstoprefractorymortar.com website. Heat Stop appears to market refractory products. I reviewed at least a portion of the website and observed use of the generic terms "refractory mortar" and "firebrick." I did not observe any use of the term "magnesita" at this website.

11. The attached Exhibit H shows at least the top of a web page at the axner.com website. Axner appears to market refractory products. I reviewed at least a portion of the website and observed use of the generic terms "refractory brick" and "firebrick." I did not observe any use of the term "magnesita" at this website.

12. The attached Exhibit I shows at least the top of a web page at the firebrickengineers.com website. Fire Brick Engineers Company appears to market refractory products. I reviewed at least a portion of the website and observed use of the generic terms "refractory products" and "fire brick." I did not observe any use of the term "magnesita" at this website.

13. The attached Exhibit J shows at least the top of a web page at the morganthermalceramics.com website. Morgan Advanced Materials appears to market refractory products. I reviewed at least a portion of the website and observed use of the generic terms "fire brick," and "firebrick." I did not observe any use of the term "magnesita" at this website.

DECLARATION ABOUT EXCLUSIVE USE
U.S. Application No. 85834316

14. The attached Exhibit K shows an image of a search for "magnesita" at the morganthermalceramics.com website.

15. The attached Exhibit L shows at least the top of a web page at the ortonceramic.com website. Orton to market testing of refractory products. I reviewed at least a portion of the website and observed use of the generic terms "refractory shapes," "refractory brick" and "refractory materials." I did not observe any use of the term "magnesita" at this website.

16. The attached Exhibit M shows at least the top of a web page at the tflhouston.com website. TFL Incorporated appears to market refractory products. I reviewed at least a portion of the website and observed use of the generic terms "firebrick," and "refractories." I did not observe any use of the term "magnesita" at this website.

17. The attached Exhibit N shows an image of a search for "magnesita" at the tflhouston.com website.

18. The attached Exhibit O shows at least the top of a web page at the hitempincusa.com website. Hi Temp Refractories to market refractory products. I reviewed at least a portion of the website and observed use of the generic terms "firebrick," and "castables." I did not observe any use of the term "magnesita" at this website.

19. The attached Exhibit P shows at least the top of a web page at the louisvillefirebrick.com website. Louisville Firebrick appears to market refractory products. I reviewed at least a portion of the website and observed use of the generic terms "firebrick," and "refractory brick." I did not observe any use of the term "magnesita" at this website.

DECLARATION ABOUT EXCLUSIVE USE
U.S. Application No. 85834316

20. The attached Exhibit Q shows at least the top of a web page at the kandg.net website. K&G Industrial Services appears to market the installation of refractory products. I reviewed at least a portion of the website and observed use of the generic term "refractory brick." I did not observe any use of the term "magnesita" at this website.

21. The attached Exhibit R shows at least the top of a web page at the firebricks.com website. Firebricks appears to market refractory products. I reviewed at least a portion of the website and observed use of the generic term "refractory bricks." I did not observe any use of the term "magnesita" at this website.

22. The attached Exhibit S shows at least the top of a web page at the elginbutler.com website. Elgin Butler appears to market refractory products. I reviewed at least a portion of the website and observed use of the generic term "fire brick." I did not observe any use of the term "magnesita" at this website.

23. The attached Exhibit T shows at least the top of a web page at the larkinrefractory.com website. Larkin Refractory Solutions appears to market refractory products. I reviewed at least a portion of the website and observed use of the generic term "fire brick." I did not observe any use of the term "magnesita" at this website.

24. The attached Exhibit U shows at least the top of the Terminology page at the larkinrefractory.com website. I observed use of the generic term "fire brick." I did not observe any use of the term "magnesita" at this website.

25. The attached Exhibit V shows at least the top of a web page at the vitcas.com website. Vitcas appears to market refractory products. I reviewed at least a portion of the website and

observed use of the generic terms "fire brick," and "firebrick." I did not observe any use of the term "magnesita" at this website.

26. The attached Exhibit W shows an image of a search for "magnesita" at the vitcas.com website.

27. The attached Exhibit X shows at least the top of a web page at the nockrefractories.com website. The Nock Refractories Company appears to market refractory products. I reviewed at least a portion of the website and observed use of the generic term "fire brick." I did not observe any use of the term "magnesita" at this website.

28. The attached Exhibit Y shows at least the top of a web page at the nwironworks.com website. The Northwest Iron Works appears to market refractory products. I reviewed at least a portion of the website and observed use of the generic term "fire brick." I did not observe any use of the term "magnesita" at this website.

29. The attached Exhibit Z shows at least the top of a web page at the miamistoneinstallers.com website. Miami Stone Installers.com appears to market refractory products. I reviewed at least a portion of the website and observed use of the generic terms "firebrick" and "fire brick." I did not observe any use of the term "magnesita" at this website.

30. The attached Exhibit AA shows at least the top of a page at the lowes.com website. Lowe's appears to market refractory products. I reviewed at least a portion of the website and observed use of the generic term "firebrick." I did not observe any use of the term "magnesita" at this website.

DECLARATION ABOUT EXCLUSIVE USE
U.S. Application No. 85834316

31. The attached Exhibit AB shows at least the top of a page at the homedepot.com website. The Home Depot appears to market refractory products. I reviewed at least a portion of the website and observed use of the generic term "fire bricks." I did not observe any use of the term "magnesita" at this website.

32. The attached Exhibit AC shows at least the top of a page at the walmart.com website. Walmart appears to market refractory products. I reviewed at least a portion of the website and observed use of the generic terms “fire brick” and "firebrick." I did not observe any use of the term "magnesita" at this website.

33. The attached Exhibit AD shows an image of a search for “magnesita” at the walmart.com website.

34. The attached Exhibit AE shows at least the top of a page at the amazon.com website. Amazon appears to market refractory products. I reviewed at least a portion of the website and observed use of the generic terms “fire brick” and "firebrick." I did not observe any use of the term "magnesita" at this website.

35. The attached Exhibit AF shows at least the top of a page at the rescoproducts.com website. RESCO Products, Inc. appears to market refractory products. I reviewed at least a portion of the website and observed use of the generic term “brick." I did not observe any use of the term "magnesita" at this website.

36. The attached Exhibit AG shows at least the top of a page at the vesuvius.com website. Vesuvius appears to market refractory products. I reviewed at least a portion of the website

and observed use of the generic term “brick." I did not observe any use of the term "magnesita" at this website.

37. The attached Exhibit AH shows at least the top of a page at the rhi-ag.com website. RHI appears to market refractory products. I reviewed at least a portion of the website and observed use of the generic term “brick." I did not observe any use of the term "magnesita" at this website.

38. The attached Exhibit AI shows at least the top of a page at the hwr.com website. ANH Refractories appears to market refractory products. I reviewed at least a portion of the website and observed use of the generic term “brick." I did not observe any use of the term "magnesita" at this website.

39. The attached Exhibit AJ shows at least the top of a page at the mineralstech.com website. Minerals Technology to market refractory products. I reviewed at least a portion of the website and observed use of the generic term “brick." I did not observe any use of the term "magnesita" at this website.

Respectfully signed,

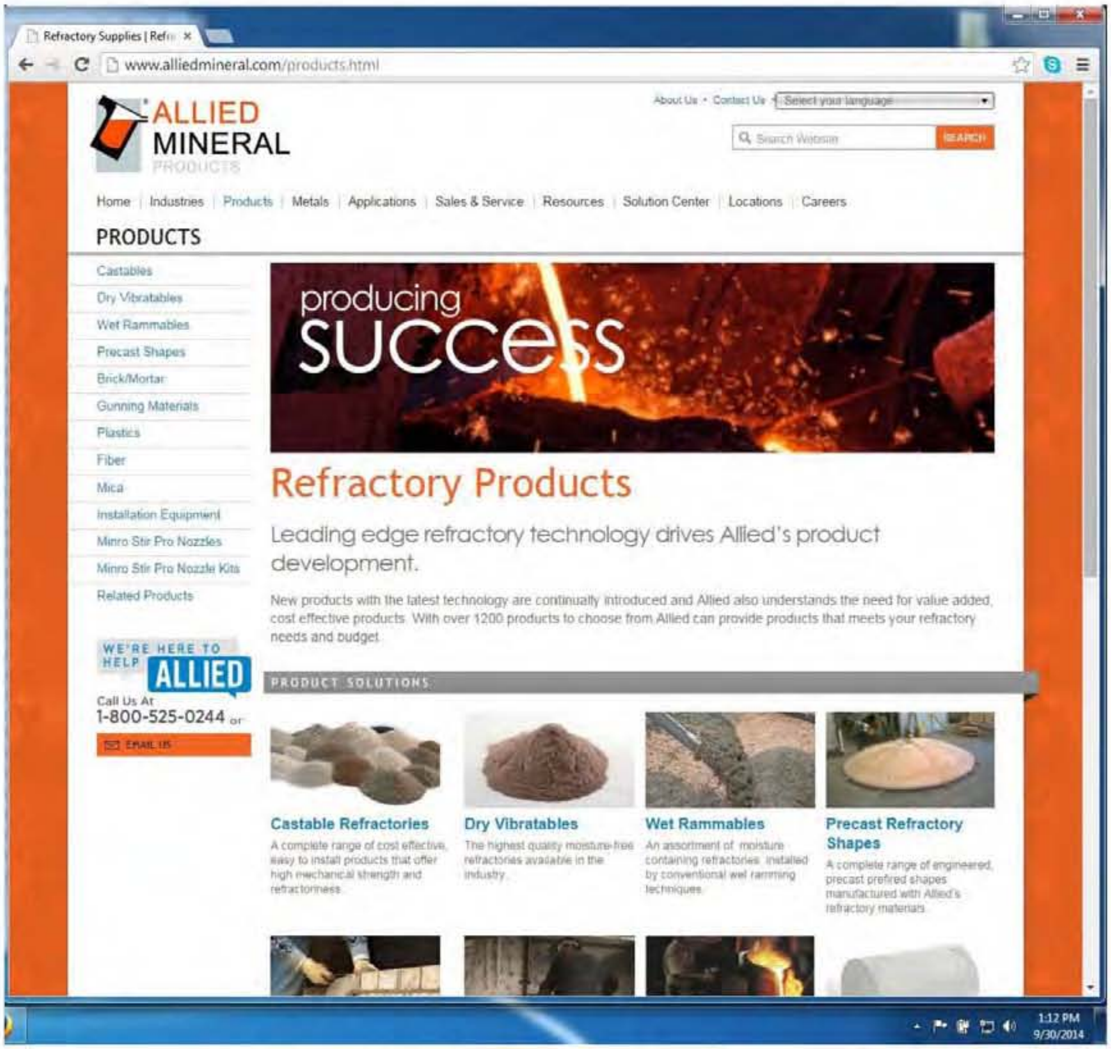
Date: May 6, 2015

/Thomas J. Moore/

Thomas J. Moore
Owner’s Attorney, Va. Bar Member

DECLARATION ABOUT EXCLUSIVE USE
U.S. Application No. 85834316

Exhibit A


Refractory Supplies | Refr
www.alliedmineral.com/products.html
ALLIED
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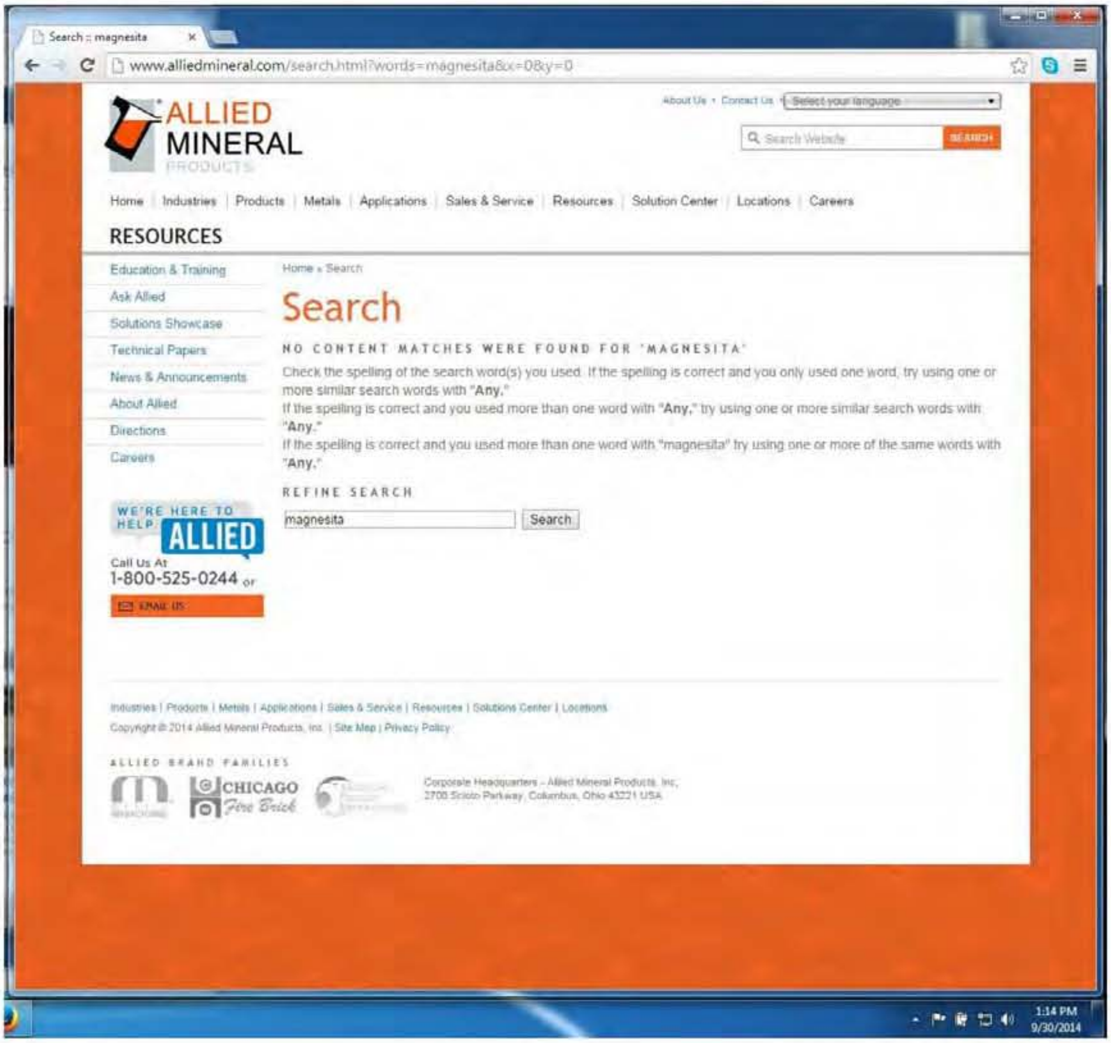
Select your language
Search Website
SEARCH
Home | Industries | Products | Metals | Applications | Sales & Service | Resources | Solution Center | Locations | Careers
PRODUCTS
Castables
Dry Vibratables
Wet Rammables
Precast Shapes
Brick/Mortar
Gunning Materials
Plastics
Fiber
Mica
Installation Equipment
Minro Stir Pro Nozzles
Minro Stir Pro Nozzle Kits
Related Products
producing
success
Refractory Products
Leading edge refractory technology drives Allied's product development.
New products with the latest technology are continually introduced and Allied also understands the need for value added, cost effective products. With over 1200 products to choose from Allied can provide products that meets your refractory needs and budget.
WE'RE HERE TO HELP
ALLIED
Call Us At
1-800-525-0244 or
EMAIL US
PRODUCT SOLUTIONS
Castable Refractories
A complete range of cost effective, easy to install products that offer high mechanical strength and refractoriness.
Dry Vibratables
The highest quality moisture-free refractories available in the industry.
Wet Rammables
An assortment of moisture containing refractories installed by conventional wet ramming techniques.
Precast Refractory Shapes
A complete range of engineered, precast prefired shapes manufactured with Allied's refractory materials.
1:12 PM
9/30/2014

DECLARATION ABOUT EXCLUSIVE USE
U.S. Application No. 85834316

Exhibit B


Search :: magnesita
www.alliedmineral.com/search.html?words=magnesita&x=0&y=0
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Search
NO CONTENT MATCHES WERE FOUND FOR 'MAGNESITA'
Check the spelling of the search word(s) you used. If the spelling is correct and you only used one word, try using one or more similar search words with "Any."
If the spelling is correct and you used more than one word with "Any," try using one or more similar search words with "Any."
If the spelling is correct and you used more than one word with "magnesita" try using one or more of the same words with "Any."
REFINE SEARCH
magnesita
Search
WE'RE HERE TO HELP. ALLIED
Call Us At
1-800-525-0244 or
CHICAGO Fire Brick
1:14 PM
9/30/2014

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Exhibit C

Refractory Brick for High

www.zircoa.com/product.coarse.grain/bricks.html

Zircoa

Refractory Brick for High Temperature Insulation & Glass Contact

Home
Products
Applications
Engineering
About
Contact
MSDS

Certified to ISO 9001: 2008 with Design

Search

Contact a Product Specialist:
• USA Worldwide: Tim Leitzel | [illegible] | [illegible] (Fax) | Online Form
• Europe, the Middle East, Africa: Thomas Bohm | [illegible] | [illegible] (Fax) | Online Form

Distributors:
• India, Sri Lanka, Bangladesh & Pakistan: Dynatec Sales | [illegible] | [illegible] (Fax)

Other Resources: Ring Calculator

Select Language ▾ Powered by Google Translate

PDF: English | Chinese

Refractory Brick Engineered for Mortar-free and Self-supporting Structures in High Temperature Cycling Environments

Refractory Brick are engineered to satisfy your specific insulating or melting requirements and deliver long term service. Calcia or yttria stabilized Zirconium Oxide pressed or tongue and groove bricks stand-up to temperatures of 2000°C and beyond. Compositions Markets served include: quartz and laser crystal growth, glass, refractory metals, carbon black and high temperature furnaces.

REFRACTORY BRICK - TONGUE AND GROOVE

Zircoa's tongue and groove bricks are designed for the building of self-supporting structures. Their design and calcia or yttria stabilized zirconia composition makes them ideal for high temperature cycling* environments.

Using Zircoa's tongue and groove brick eliminates line of sight radiation, and adds physical stability to the structure. Rings and circles, with an ID as small as 6" can be achieved. Applications include heat shields, furnace roofs and linings.

Ring Calculator – Our online calculator can help you determine the quantity of Zircoa 2" high arch and straight tongue and groove bricks required to construct 6" to 72" diameter rings.

* Controlled heat up and cool down are important for long life.

REFRACTORY BRICK - STANDARD

Standard refractory bricks (left) are used primarily for custom high-temperature furnace linings, supports and heat shields. Zircoa's standard bricks withstand operating temperatures greater than 2000°C (3630°F) with capacity to spare. Quartz melting and synthetic crystal growing are typical applications.

SPECIFICATIONS

MSDS for Refractory Brick

Follow the composition number links for the corresponding MSDS.

- Composition 108
- Composition 0871
- Composition 0872
- Composition 0890
- Composition 0125
- Composition 1591
- Composition 1651
- Composition 1859
- Composition 1959
- Composition 2290
- Composition 3001
- Composition 3004

Heat Transfer of Pressed Brick (Composition 1651)

Dense Brick — 4.45 g/cm3 (278 lbs./ft.3) Hot Face — 5 hours exposure at 1980°C (3600°F)			
51 mm (2") Thick Brick	Hot Face	Cold Face	Cold Face Grog
No grog backup	1982°C (3600°F)	704°C (1300°F)	— —
26mm (1") grog backup	1980°C (3600°F)	1149°C (2100°F)	538°C (1000°F)
51mm (2")	[illegible]	[illegible]	[illegible]

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U.S. Application No. 85834316

Exhibit D

www.bnzmaterials.com
Call Us Today!
BNZ
BNZ Materials, Inc.
Insulating Firebricks
BNZ Standard ASTM Grade
BNZ Specialty Grade
Plemet France IFB Grades
IFB DATA
MSDS
Additional Insulating Fire Brick
Advantages of IFB
Available Forms
BNZ Standard ASTM Grades
Design

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U.S. Application No. 85834316

Exhibit E

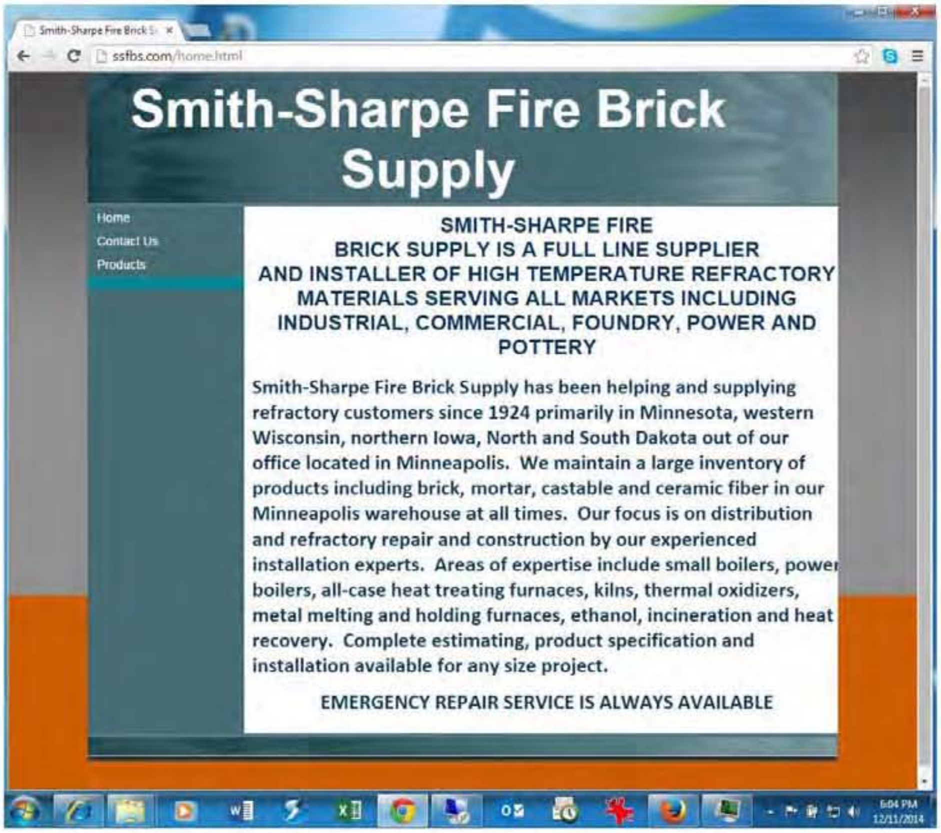
ssfbs.com/home.html
Smith-Sharpe Fire Brick Supply
Home
Contact Us
Products
SMITH-SHARPE FIRE BRICK SUPPLY IS A FULL LINE SUPPLIER AND INSTALLER OF HIGH TEMPERATURE REFRACTORY MATERIALS SERVING ALL MARKETS INCLUDING INDUSTRIAL, COMMERCIAL, FOUNDRY, POWER AND POTTERY
Smith-Sharpe Fire Brick Supply has been helping and supplying refractory customers since 1924 primarily in Minnesota, western Wisconsin, northern Iowa, North and South Dakota out of our office located in Minneapolis. We maintain a large inventory of products including brick, mortar, castable and ceramic fiber in our Minneapolis warehouse at all times. Our focus is on distribution and refractory repair and construction by our experienced installation experts. Areas of expertise include small boilers, power boilers, all-case heat treating furnaces, kilns, thermal oxidizers, metal melting and holding furnaces, ethanol, incineration and heat recovery. Complete estimating, product specification and installation available for any size project.
EMERGENCY REPAIR SERVICE IS ALWAYS AVAILABLE

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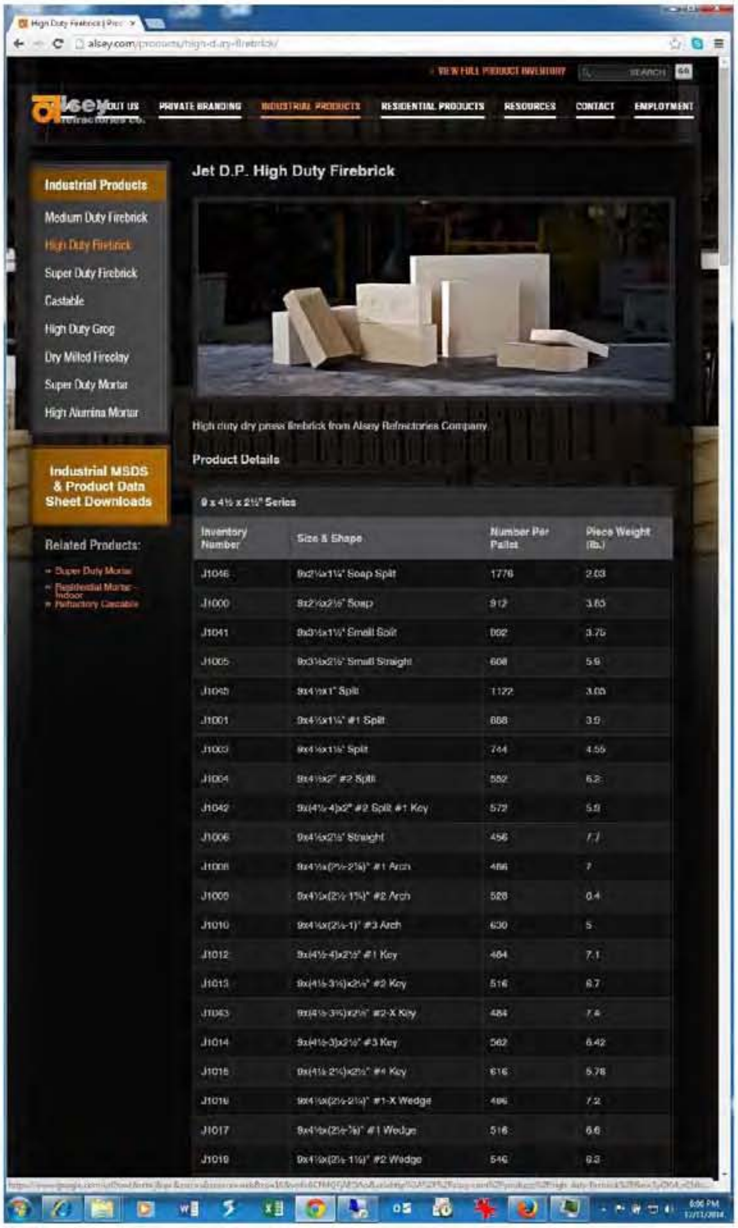
Exhibit F


alsey.com/products/high-duty-firebrick/
VIEW FULL PRODUCT INVENTORY
SEARCH
GO
ABOUT US
PRIVATE BRANDING
INDUSTRIAL PRODUCTS
RESIDENTIAL PRODUCTS
RESOURCES
CONTACT
EMPLOYMENT
Industrial Products
Medium Duty Firebrick
High Duty Firebrick
Super Duty Firebrick
Castable
High Duty Grog
Dry Milled Fireclay
Super Duty Mortar
High Alumina Mortar
Industrial MSDS & Product Data Sheet Downloads
Related Products:
Super Duty Mortar
Residential Mortar - Indoor
Refractory Castable
Jet D.P. High Duty Firebrick
High duty dry press firebrick from Alsey Refractories Company
Product Details

9 x 4½ x 2½" Series

Inventory Number	Size & Shape	Number Per Pallet	Piece Weight (lb.)
J1046	9x2½x1¼" Soap Split	1776	2.03
J1000	9x2½x2½" Soap	912	3.65
J1041	9x3½x1½" Small Split	992	3.75
J1005	9x3½x2½" Small Straight	608	5.9
J1045	9x4½x1" Split	1122	3.05
J1001	9x4½x1¼" #1 Split	888	3.9
J1003	9x4½x1½" Split	744	4.55
J1004	9x4½x2" #2 Split	552	6.2
J1042	9x(4½-4)x2" #2 Split #1 Key	572	5.9
J1006	9x4½x2½" Straight	456	7.7
J1008	9x4½x(2½-2⅛)" #1 Arch	486	7
J1009	9x4½x(2½-1⅞)" #2 Arch	528	6.4
J1010	9x4½x(2½-1)" #3 Arch	630	5
J1012	9x(4½-4)x2½" #1 Key	484	7.1
J1013	9x(4½-3½)x2½" #2 Key	516	6.7
J1043	9x(4½-3½)x2½" #2-X Key	484	7.4
J1014	9x(4½-3)x2½" #3 Key	562	6.42
J1015	9x(4½-2¼)x2½" #4 Key	616	5.78
J1016	9x4½x(2½-2¼)" #1-X Wedge	486	7.2
J1017	9x4½x(2½-⅞)" #1 Wedge	516	6.6
J1019	9x4½x(2½-1½)" #2 Wedge	546	6.3

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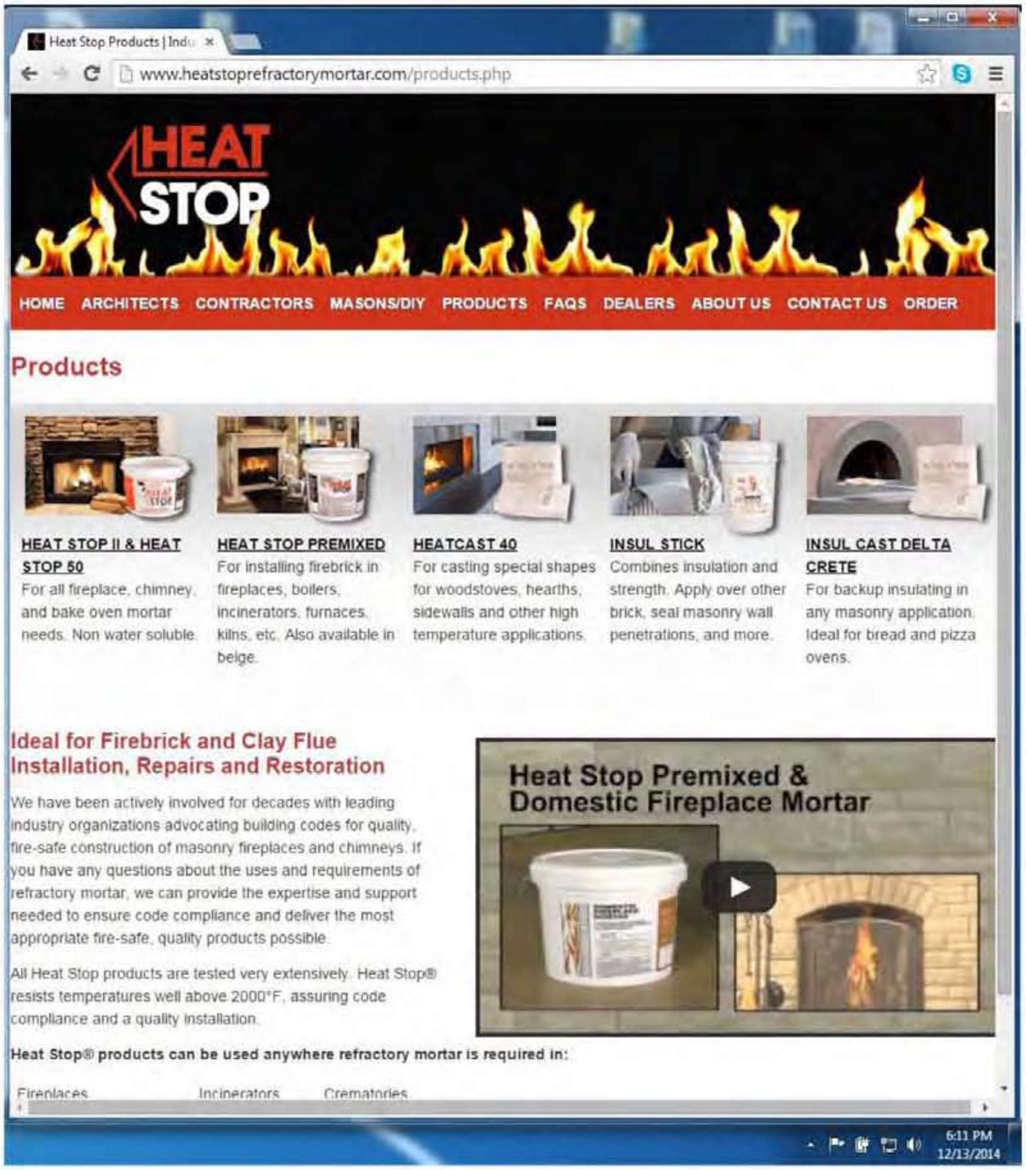
U.S. Application No. 85834316

Exhibit G


Heat Stop Products | Indu
www.heatstoprefractorymortar.com/products.php
HEAT STOP
HOME ARCHITECTS CONTRACTORS MASONS/DIY PRODUCTS FAQS DEALERS ABOUT US CONTACT US ORDER
Products
HEAT STOP II & HEAT STOP 50
For all fireplace, chimney, and bake oven mortar needs. Non water soluble.
HEAT STOP PREMIXED
For installing firebrick in fireplaces, boilers, incinerators, furnaces, kilns, etc. Also available in beige.
HEATCAST 40
For casting special shapes for woodstoves, hearths, sidewalls and other high temperature applications.
INSUL STICK
Combines insulation and strength. Apply over other brick, seal masonry wall penetrations, and more.
INSUL CAST DELTA CRETE
For backup insulating in any masonry application. Ideal for bread and pizza ovens.
Ideal for Firebrick and Clay Flue Installation, Repairs and Restoration
We have been actively involved for decades with leading industry organizations advocating building codes for quality, fire-safe construction of masonry fireplaces and chimneys. If you have any questions about the uses and requirements of refractory mortar, we can provide the expertise and support needed to ensure code compliance and deliver the most appropriate fire-safe, quality products possible.
All Heat Stop products are tested very extensively. Heat Stop® resists temperatures well above 2000°F, assuring code compliance and a quality installation.
Heat Stop® products can be used anywhere refractory mortar is required in:
Fireplaces Incinerators Crematories
Heat Stop Premixed & Domestic Fireplace Mortar
6:11 PM
12/13/2014

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U.S. Application No. 85834316

Exhibit H

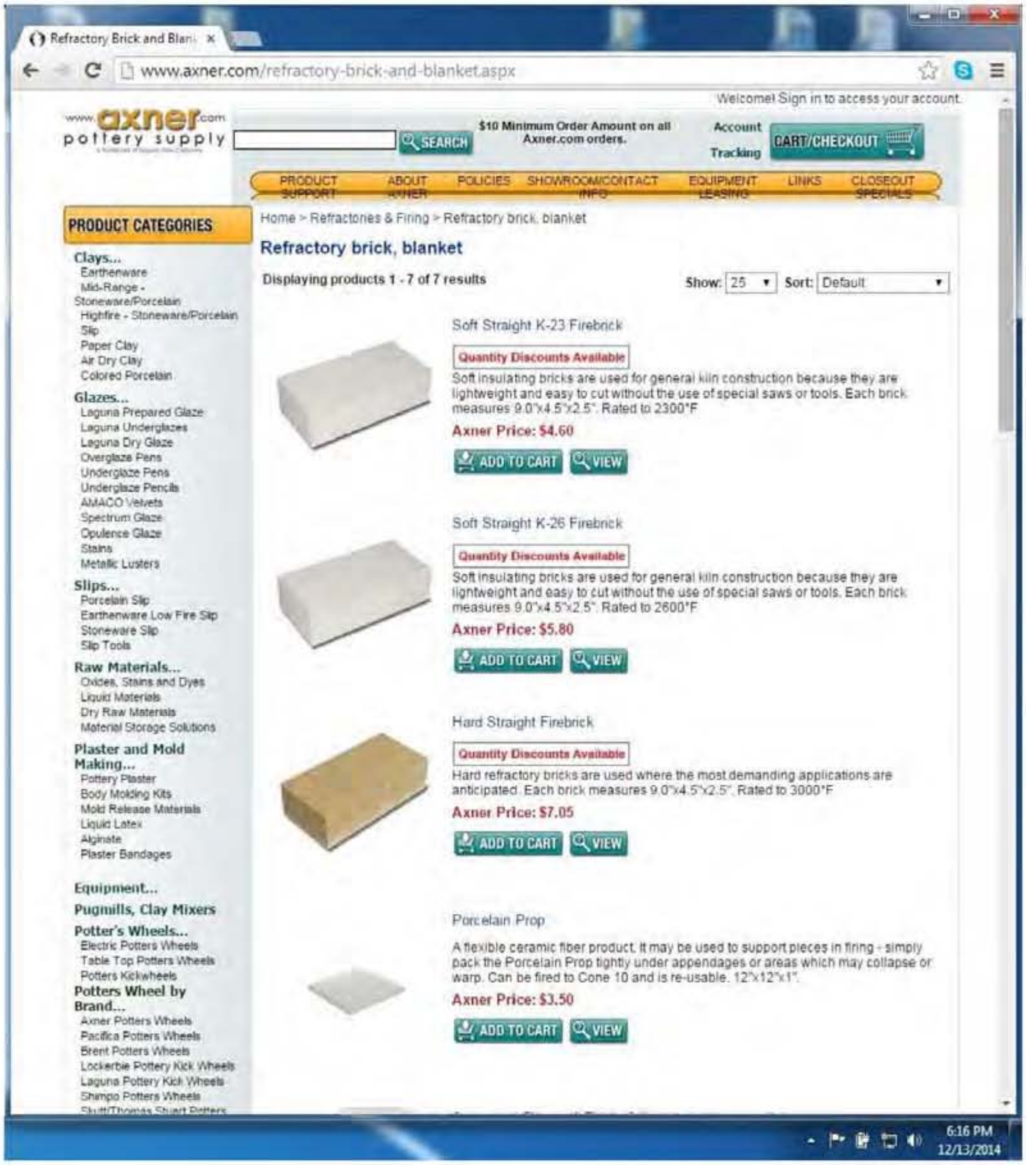
Refractory Brick and Blan
www.axner.com/refractory-brick-and-blanket.aspx
Welcome! Sign in to access your account.
www.axner.com
pottery supply
SEARCH
$10 Minimum Order Amount on all Axner.com orders.
Account
Tracking
CART/CHECKOUT
PRODUCT SUPPORT
ABOUT AXNER
POLICIES
SHOWROOM/CONTACT INFO
EQUIPMENT LEASING
LINKS
CLOSEOUT SPECIALS
PRODUCT CATEGORIES
Clays...
Earthenware
Mid-Range - Stoneware/Porcelain
Highfire - Stoneware/Porcelain
Slip
Paper Clay
Air Dry Clay
Colored Porcelain
Glazes...
Laguna Prepared Glaze
Laguna Underglazes
Laguna Dry Glaze
Overglaze Pens
Underglaze Pens
Underglaze Pencils
AMACO Velvets
Spectrum Glaze
Opulence Glaze
Stains
Metallic Lusters
Slips...
Porcelain Slip
Earthenware Low Fire Slip
Stoneware Slip
Slip Tools
Raw Materials...
Oxides, Stains and Dyes
Liquid Materials
Dry Raw Materials
Material Storage Solutions
Plaster and Mold Making...
Pottery Plaster
Body Molding Kits
Mold Release Materials
Liquid Latex
Alginate
Plaster Bandages
Equipment...
Pugmills, Clay Mixers
Potter's Wheels...
Electric Potters Wheels
Table Top Potters Wheels
Potters Kickwheels
Potters Wheel by Brand...
Axner Potters Wheels
Pacifica Potters Wheels
Brent Potters Wheels
Lockerbie Pottery Kick Wheels
Laguna Pottery Kick Wheels
Shimpo Potters Wheels
Home > Refractories & Firing > Refractory brick, blanket
Refractory brick, blanket
Displaying products 1 - 7 of 7 results
Show: 25
Sort: Default
Soft Straight K-23 Firebrick
Quantity Discounts Available
Soft insulating bricks are used for general kiln construction because they are lightweight and easy to cut without the use of special saws or tools. Each brick measures 9.0"x4.5"x2.5". Rated to 2300°F
Axner Price: $4.60
ADD TO CART
VIEW
Soft Straight K-26 Firebrick
Quantity Discounts Available
Soft insulating bricks are used for general kiln construction because they are lightweight and easy to cut without the use of special saws or tools. Each brick measures 9.0"x4.5"x2.5". Rated to 2600°F
Axner Price: $5.80
ADD TO CART
VIEW
Hard Straight Firebrick
Quantity Discounts Available
Hard refractory bricks are used where the most demanding applications are anticipated. Each brick measures 9.0"x4.5"x2.5". Rated to 3000°F
Axner Price: $7.05
ADD TO CART
VIEW
Porcelain Prop
A flexible ceramic fiber product. It may be used to support pieces in firing - simply pack the Porcelain Prop tightly under appendages or areas which may collapse or warp. Can be fired to Cone 10 and is re-usable. 12"x12"x1".
Axner Price: $3.50
ADD TO CART
VIEW
6:16 PM
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Exhibit I

Refractory Products | Ref
www.firebrickengineers.com
"Experts in Heat Management"
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Welcome to Fire Brick Engineers Company
A Member of POWERS HOLDINGS, INC., CERAMICS GROUP
CAROLINA
NOCK
IFB
Fire Brick Engineers Company is the American leader in the manufacture and distribution of the finest refractory products. At Fire Brick Engineers Company our refractory solutions deliver a higher level of dependability whether it is a high temperature insulation application, Shotcrete refractory, ceramics, vacuum formed shapes of ceramic fiber, custom cast refractory shapes, high temperature gaskets, induction furnace tops and bottoms or induction furnace coil repair. Fire Brick Engineers Company delivers engineered solutions for all of your thermal management challenges.
Fire Brick Engineers Company utilizes refined in-house testing facilities testing density hardness and modules of rupture. Fire Brick Engineers Company quality control plan coupled with plant automation, guarantees Fire Brick Engineers Company products set the
Fire Brick News
10/15/2014 Quality Improvements Made Not Only in Manufacturing, but Personnel as Well
Sara Vanderlin, MBA, has joined the Fire Brick Engineers' team as Manufacturing Engineer.
1/15/2014 Westmoreland Advance Materials changes aluminum melting mentality
Westmoreland Advanced Materials, or WAM, is changing the face of the aluminum melting and die cast industry. Bottom line, corundum just doesn't stick or penetrate and their lower density product saves on energy.
2/19/2013 Milwaukee Organization Changes
Adam M. Wood, PHI Ceramics Group, has been promoted to Western Sales Manager. Adam will oversee all sales and marketing responsibilities for PHI Ceramics Western divisions including Fire Brick Engineers and Carolina Fire Brick.
Patrick Badzinski has recently joined Fire Brick Engineers as Manufacturing Engineer. Patrick will be challenged to
6:21 PM
12/13/2014

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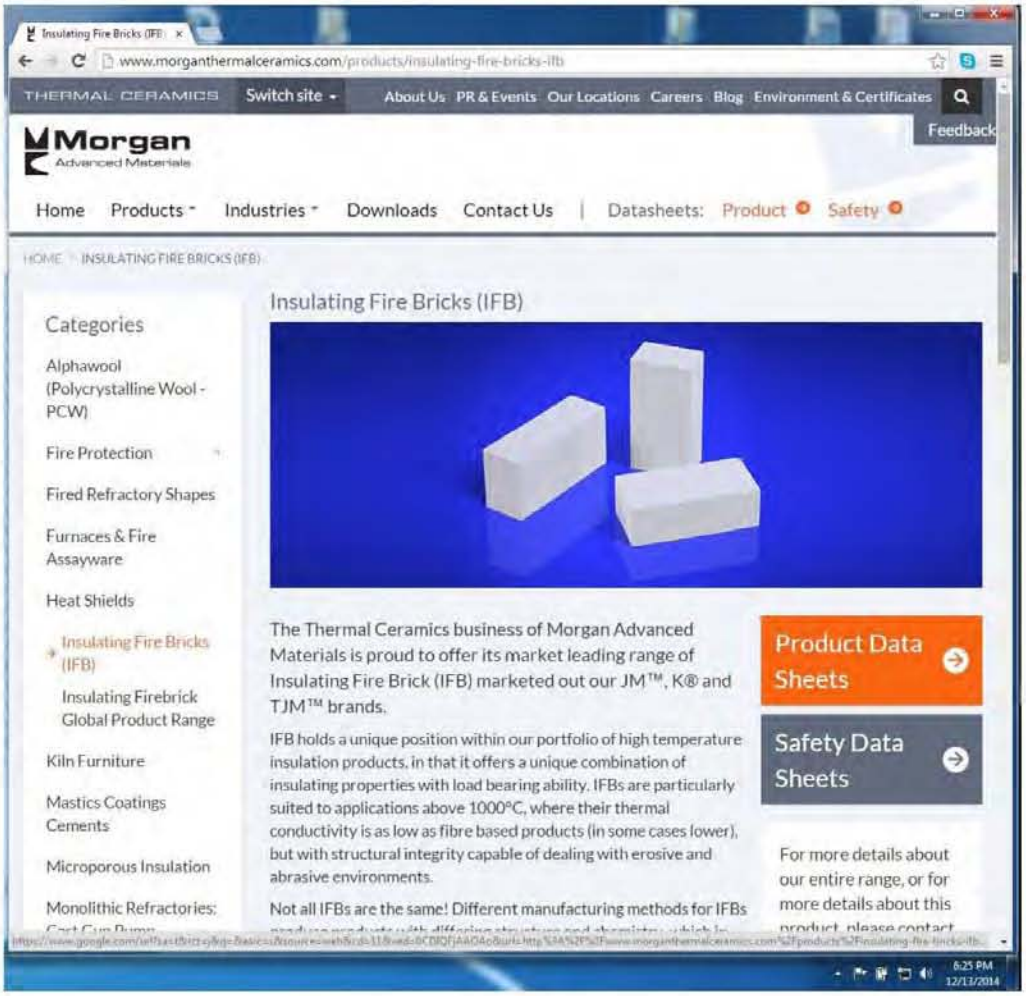
U.S. Application No. 85834316

Exhibit J


Insulating Fire Bricks (IFB)
www.morganthermalceramics.com/products/insulating-fire-bricks-ifb
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Product
Safety
HOME INSULATING FIRE BRICKS (IFB)
Insulating Fire Bricks (IFB)
Categories
Alphawool (Polycrystalline Wool - PCW)
Fire Protection
Fired Refractory Shapes
Furnaces & Fire Assayware
Heat Shields
Insulating Fire Bricks (IFB)
Insulating Firebrick Global Product Range
Kiln Furniture
Mastics Coatings Cements
Microporous Insulation
Monolithic Refractories:
The Thermal Ceramics business of Morgan Advanced Materials is proud to offer its market leading range of Insulating Fire Brick (IFB) marketed out our JM™, K® and TJM™ brands.
IFB holds a unique position within our portfolio of high temperature insulation products, in that it offers a unique combination of insulating properties with load bearing ability. IFBs are particularly suited to applications above 1000°C, where their thermal conductivity is as low as fibre based products (in some cases lower), but with structural integrity capable of dealing with erosive and abrasive environments.
Not all IFBs are the same! Different manufacturing methods for IFBs
Product Data Sheets
Safety Data Sheets
For more details about our entire range, or for more details about this
6:25 PM
12/13/2014

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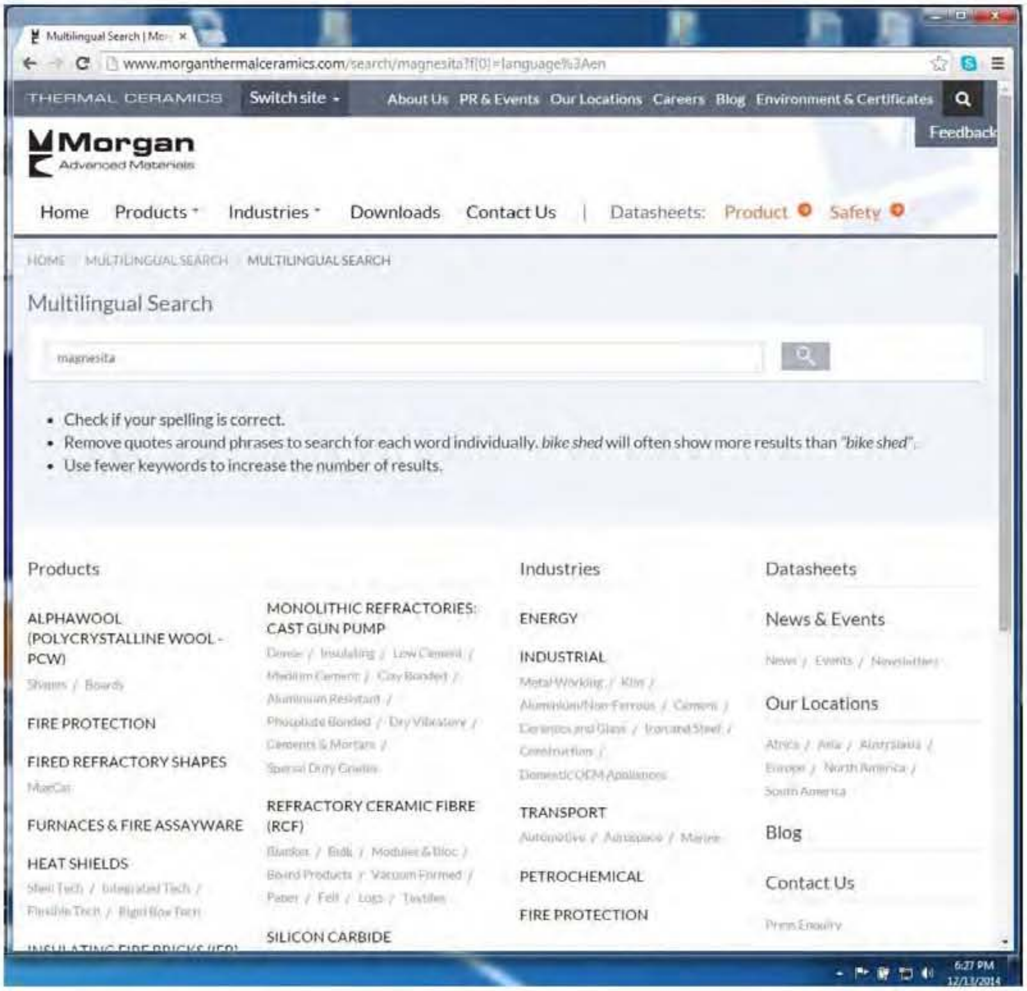
Exhibit K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Blog
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Morgan
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Product
Safety
HOME / MULTILINGUAL SEARCH / MULTILINGUAL SEARCH
Multilingual Search
magnesita
• Check if your spelling is correct.
• Remove quotes around phrases to search for each word individually. bike shed will often show more results than "bike shed".
• Use fewer keywords to increase the number of results.
Products
ALPHAWOOL (POLYCRYSTALLINE WOOL - PCW)
FIRE PROTECTION
FIRED REFRACTORY SHAPES
FURNACES & FIRE ASSAYWARE
HEAT SHIELDS
MONOLITHIC REFRACTORIES: CAST GUN PUMP
REFRACTORY CERAMIC FIBRE (RCF)
SILICON CARBIDE
Industries
ENERGY
INDUSTRIAL
TRANSPORT
PETROCHEMICAL
FIRE PROTECTION
Datasheets
News & Events
Our Locations
Blog
Contact Us

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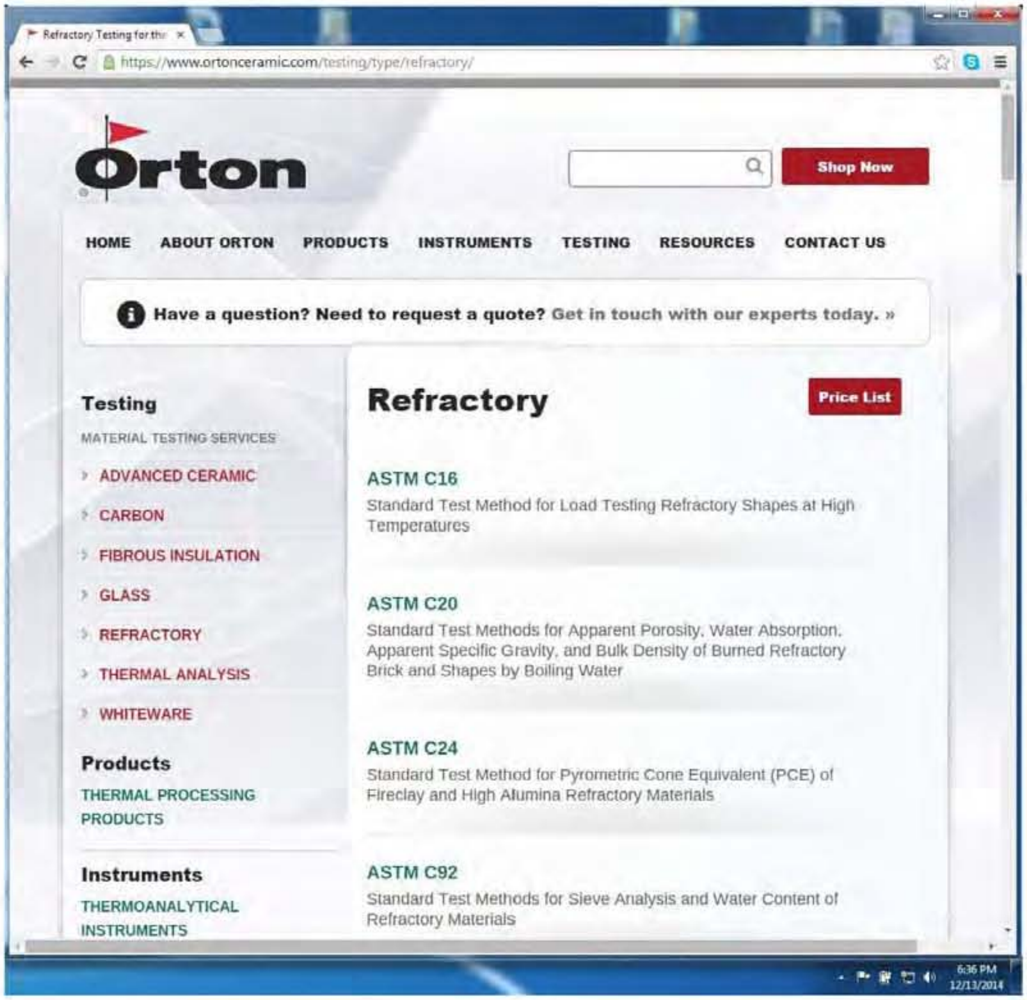
U.S. Application No. 85834316

Exhibit L


Refractory Testing for the
https://www.ortonceramic.com/testing/type/refractory/
Orton
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TESTING
RESOURCES
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CARBON
FIBROUS INSULATION
GLASS
REFRACTORY
THERMAL ANALYSIS
WHITEWARE
Products
THERMAL PROCESSING PRODUCTS
Instruments
THERMOANALYTICAL INSTRUMENTS
Refractory
Price List
ASTM C16
Standard Test Method for Load Testing Refractory Shapes at High Temperatures
ASTM C20
Standard Test Methods for Apparent Porosity, Water Absorption, Apparent Specific Gravity, and Bulk Density of Burned Refractory Brick and Shapes by Boiling Water
ASTM C24
Standard Test Method for Pyrometric Cone Equivalent (PCE) of Fireclay and High Alumina Refractory Materials
ASTM C92
Standard Test Methods for Sieve Analysis and Water Content of Refractory Materials
6:36 PM
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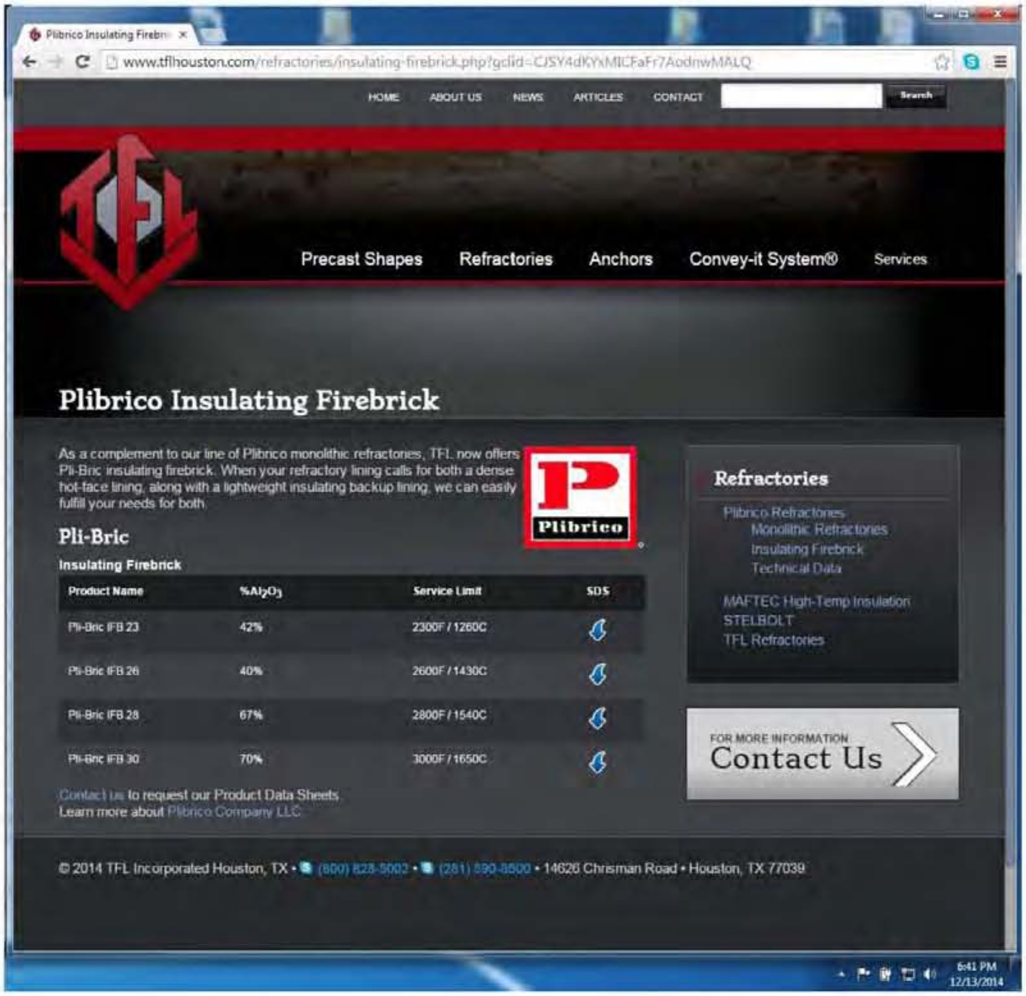
Exhibit M


Plibrico Insulating Firebr
www.tflhouston.com/refractories/insulating-firebrick.php?gclid=CJSY4dKYxMICFaFr7AodnwMALQ
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Refractories
Anchors
Convey-it System®
Services
Plibrico Insulating Firebrick
As a complement to our line of Plibrico monolithic refractories, TFL now offers Pli-Bric insulating firebrick. When your refractory lining calls for both a dense hot-face lining, along with a lightweight insulating backup lining, we can easily fulfill your needs for both.
Plibrico
Pli-Bric
Insulating Firebrick
Product Name
%Al2O3
Service Limit
SDS
Pli-Bric IFB 23
42%
2300F / 1260C
Pli-Bric IFB 26
40%
2600F / 1430C
Pli-Bric IFB 28
67%
2800F / 1540C
Pli-Bric IFB 30
70%
3000F / 1650C
Contact us to request our Product Data Sheets.
Learn more about Plibrico Company LLC
Refractories
Plibrico Refractories
Monolithic Refractories
Insulating Firebrick
Technical Data
MAFTEC High-Temp Insulation
STELBOLT
TFL Refractories
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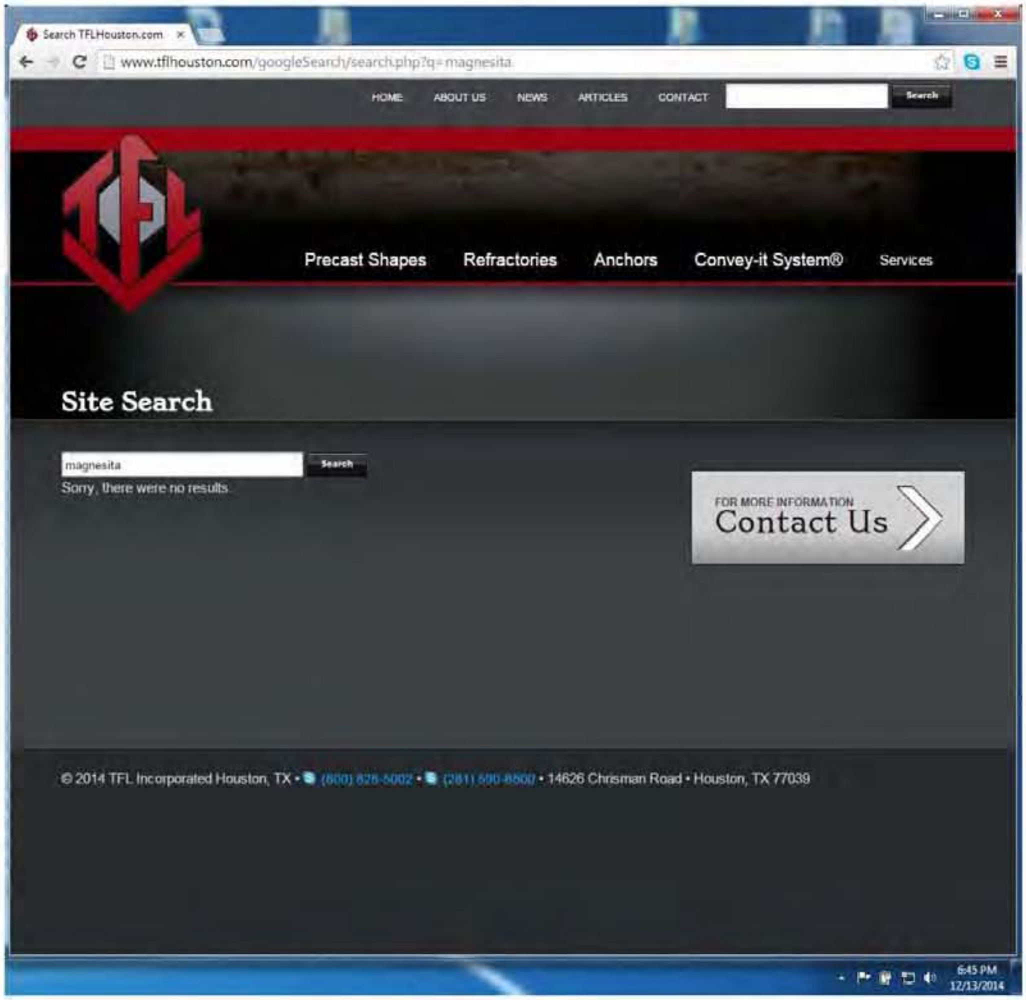
U.S. Application No. 85834316

Exhibit N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CONTACT
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Precast Shapes
Refractories
Anchors
Convey-it System®
Services
Site Search
magnesita
Search
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12/13/2014

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U.S. Application No. 85834316

Exhibit O

firebrick, refractory, fire b
hitempincusa.com/firebricks.asp
Hi TEMP
REFRACTORIES
CERAMIC FIBER• CUSTOM SHAPES•FIREBRICK
SALES HOTLINE
»HOMEPAGE
»ABOUT US
»SERVICES/PRODUCTS
»CERAMIC FIBER
»CUSTOM SHAPES
»FIREBRICK/IFB
»CASTABLES
»ONLINE SPECIALS
»BRICK SIZE CHART
»CONTACT US
Call Us At
Monday To Friday
8 AM To 5 PM CST
FIREBRICK AND INSULATING FIREBRICK
We have a large inventory of firebrick in many hard to find sizes and shapes. Specialty, standard, major brand and unbranded firebricks are ready for immediate shipment. See our brick size chart for all standard firebrick in stock. Call or email for pricing. No minimum order. Volume discounts. Fast shipping.
SINCE 1951 • FAST SHIPPING • WE TAKE ALL CREDIT CARDS • YOUR ONLINE SOURCE FOR HIGH TEMPERATURE REFRACTORIES
6:54 PM
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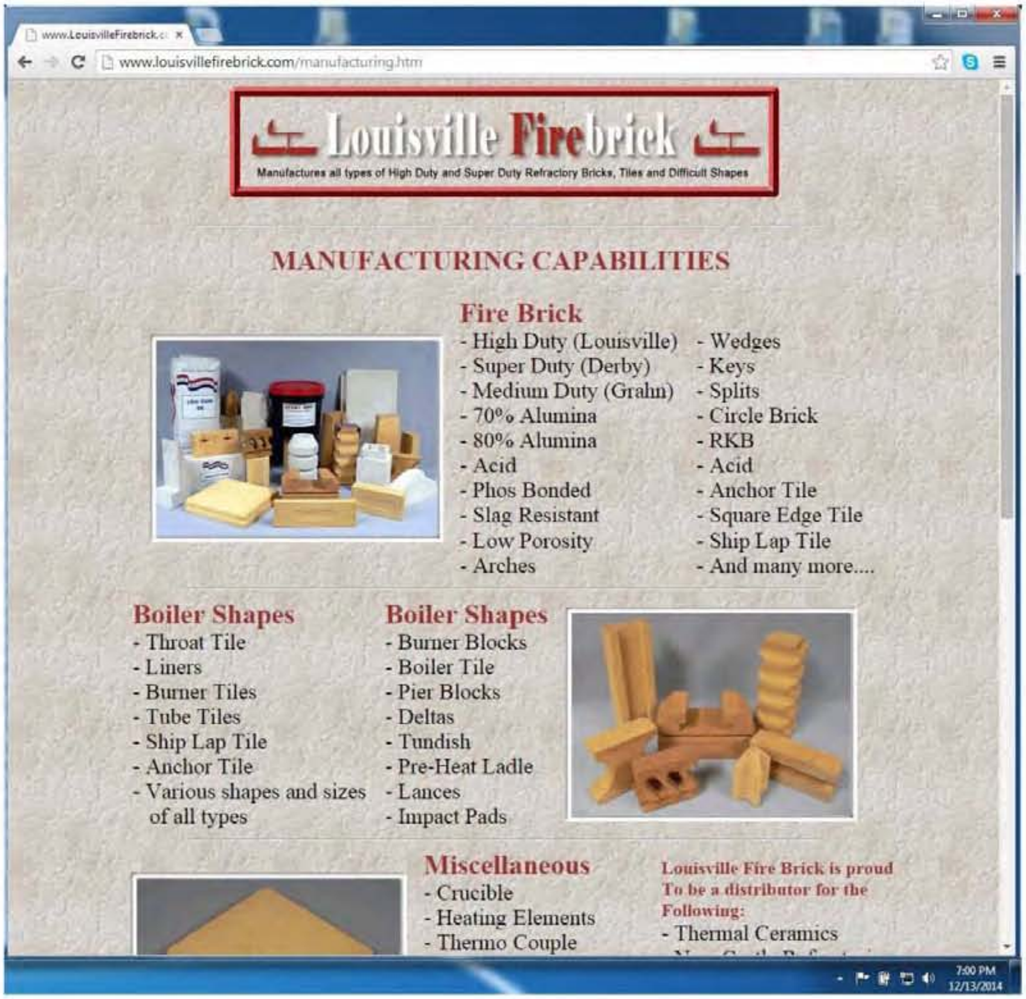
U.S. Application No. 85834316

Exhibit P



www.LouisvilleFirebrick.c

www.louisvillefirebrick.com/manufacturing.htm

Louisville Firebrick

Manufactures all types of High Duty and Super Duty Refractory Bricks, Tiles and Difficult Shapes

MANUFACTURING CAPABILITIES

Fire Brick

- High Duty (Louisville)
- Super Duty (Derby)
- Medium Duty (Grahn)
- 70% Alumina
- 80% Alumina
- Acid
- Phos Bonded
- Slag Resistant
- Low Porosity
- Arches
- Wedges
- Keys
- Splits
- Circle Brick
- RKB
- Acid
- Anchor Tile
- Square Edge Tile
- Ship Lap Tile
- And many more....

Boiler Shapes

- Throat Tile
- Liners
- Burner Tiles
- Tube Tiles
- Ship Lap Tile
- Anchor Tile
- Various shapes and sizes of all types

Boiler Shapes

- Burner Blocks
- Boiler Tile
- Pier Blocks
- Deltas
- Tundish
- Pre-Heat Ladle
- Lances
- Impact Pads

Miscellaneous

- Crucible
- Heating Elements
- Thermo Couple

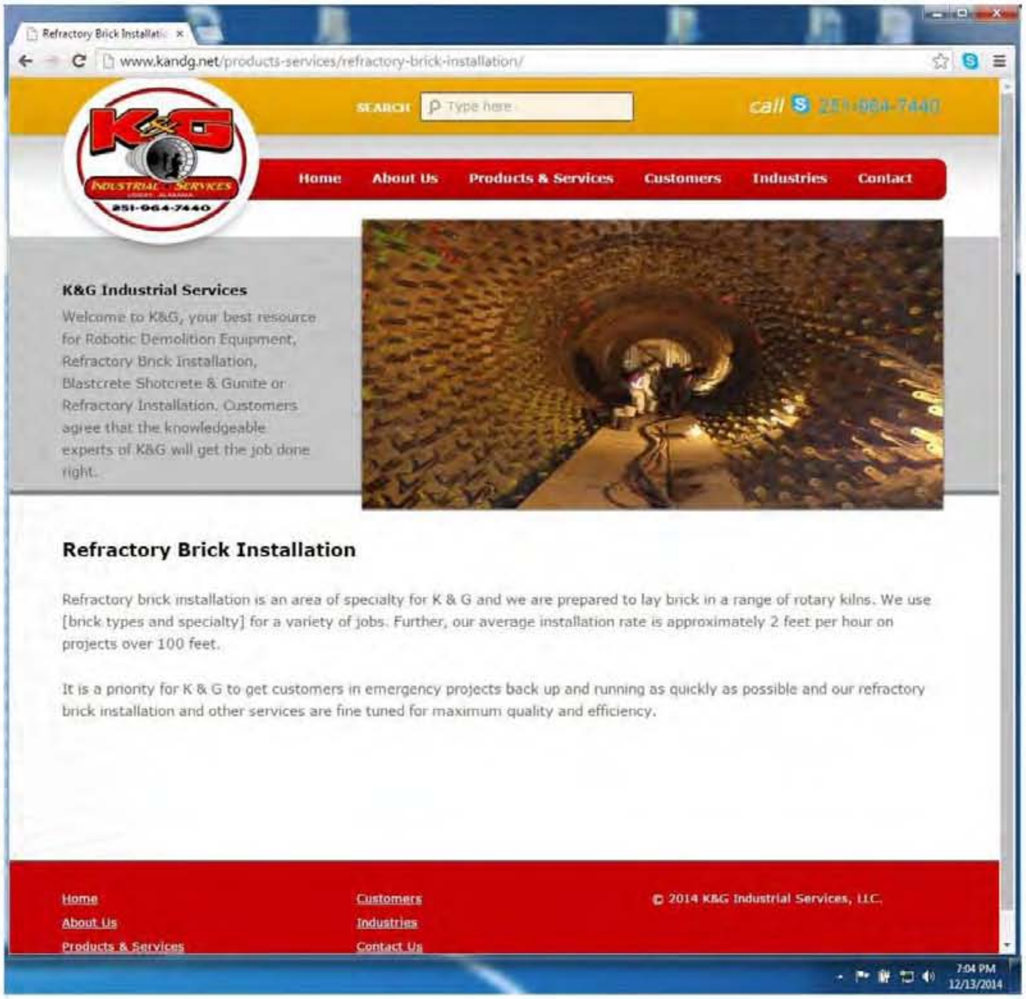
Louisville Fire Brick is proud To be a distributor for the Following:

- Thermal Ceramics

7:00 PM 12/13/2014

DECLARATION ABOUT EXCLUSIVE USE
U.S. Application No. 85834316

Exhibit Q


Refractory Brick Installati
www.kandg.net/products-services/refractory-brick-installation/
SEARCH
Type here
call 251-964-7440
K&G
INDUSTRIAL SERVICES
251-964-7440
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Industries
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K&G Industrial Services
Welcome to K&G, your best resource for Robotic Demolition Equipment, Refractory Brick Installation, Blastcrete Shotcrete & Gunite or Refractory Installation. Customers agree that the knowledgeable experts of K&G will get the job done right.
Refractory Brick Installation
Refractory brick installation is an area of specialty for K & G and we are prepared to lay brick in a range of rotary kilns. We use [brick types and specialty] for a variety of jobs. Further, our average installation rate is approximately 2 feet per hour on projects over 100 feet.
It is a priority for K & G to get customers in emergency projects back up and running as quickly as possible and our refractory brick installation and other services are fine tuned for maximum quality and efficiency.
Home
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7:04 PM
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Exhibit R

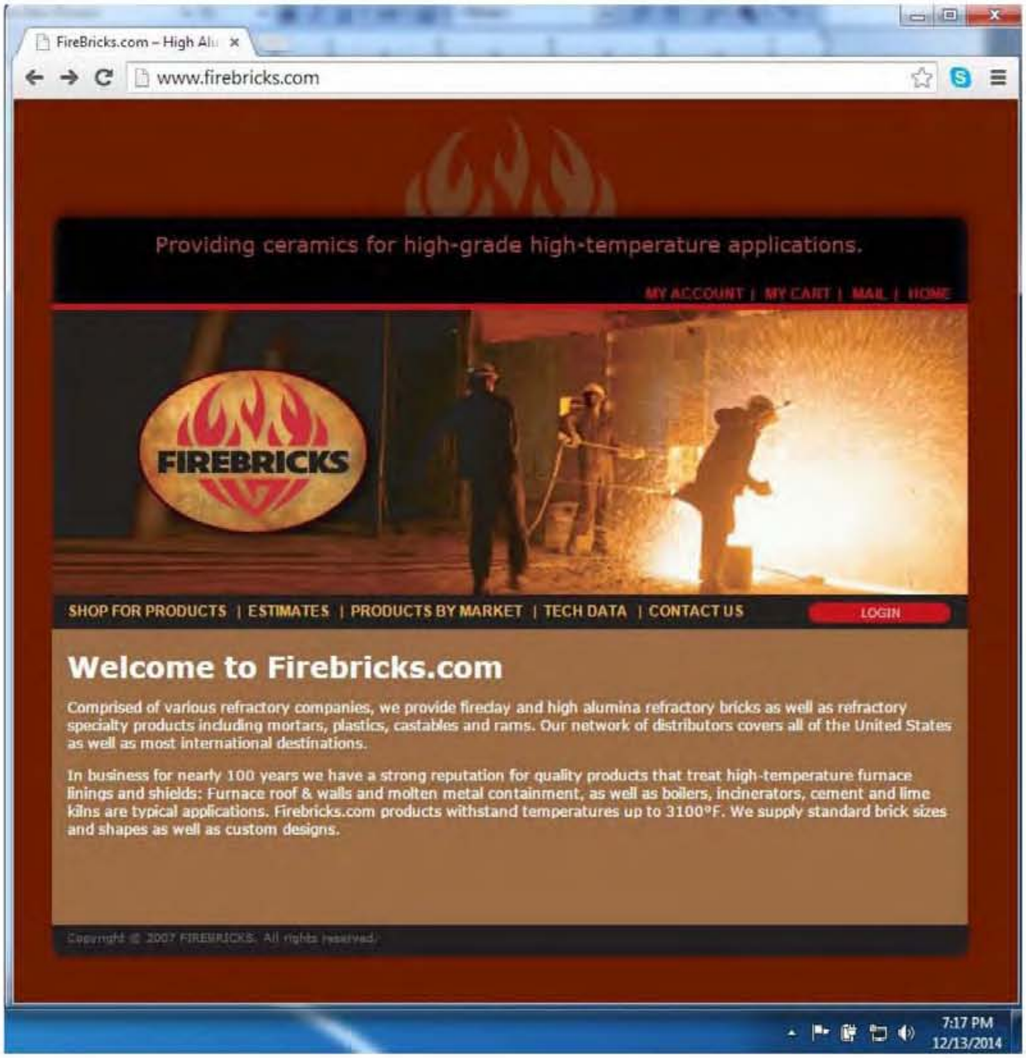
FireBricks.com – High Alu
www.firebricks.com
Providing ceramics for high-grade high-temperature applications.
MY ACCOUNT | MY CART | MAIL | HOME
FIREBRICKS
SHOP FOR PRODUCTS | ESTIMATES | PRODUCTS BY MARKET | TECH DATA | CONTACT US
LOGIN
Welcome to Firebricks.com
Comprised of various refractory companies, we provide fireclay and high alumina refractory bricks as well as refractory specialty products including mortars, plastics, castables and rams. Our network of distributors covers all of the United States as well as most international destinations.
In business for nearly 100 years we have a strong reputation for quality products that treat high-temperature furnace linings and shields: Furnace roof & walls and molten metal containment, as well as boilers, incinerators, cement and lime kilns are typical applications. Firebricks.com products withstand temperatures up to 3100°F. We supply standard brick sizes and shapes as well as custom designs.
Copyright © 2007 FIREBRICKS. All rights reserved.
7:17 PM
12/13/2014

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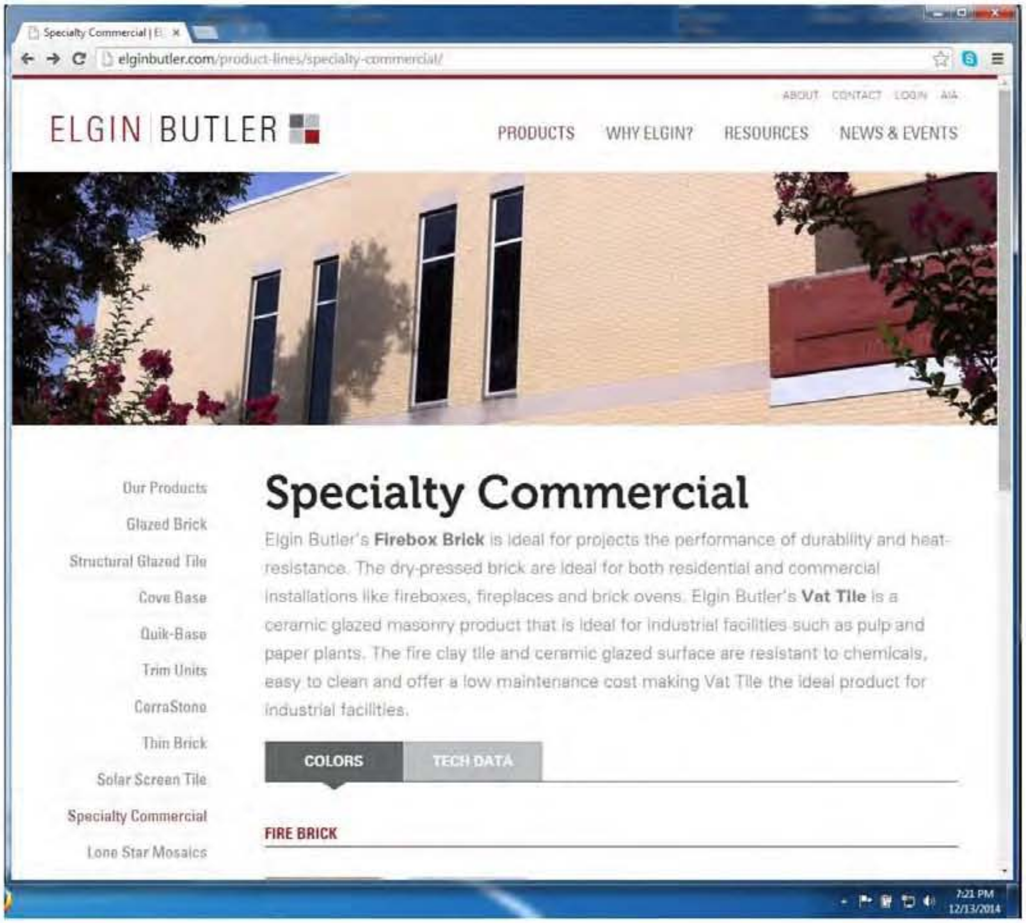
Exhibit S


Specialty Commercial | E
elginbutler.com/product-lines/specialty-commercial/
ABOUT CONTACT LOGIN AIA
ELGIN BUTLER
PRODUCTS
WHY ELGIN?
RESOURCES
NEWS & EVENTS
Our Products
Glazed Brick
Structural Glazed Tile
Cove Base
Quik-Base
Trim Units
CorraStone
Thin Brick
Solar Screen Tile
Specialty Commercial
Lone Star Mosaics
Specialty Commercial
Elgin Butler's Firebox Brick is ideal for projects the performance of durability and heat-resistance. The dry-pressed brick are ideal for both residential and commercial installations like fireboxes, fireplaces and brick ovens. Elgin Butler's Vat Tile is a ceramic glazed masonry product that is ideal for industrial facilities such as pulp and paper plants. The fire clay tile and ceramic glazed surface are resistant to chemicals, easy to clean and offer a low maintenance cost making Vat Tile the ideal product for industrial facilities.
COLORS
TECH DATA
FIRE BRICK
7:21 PM
12/13/2014

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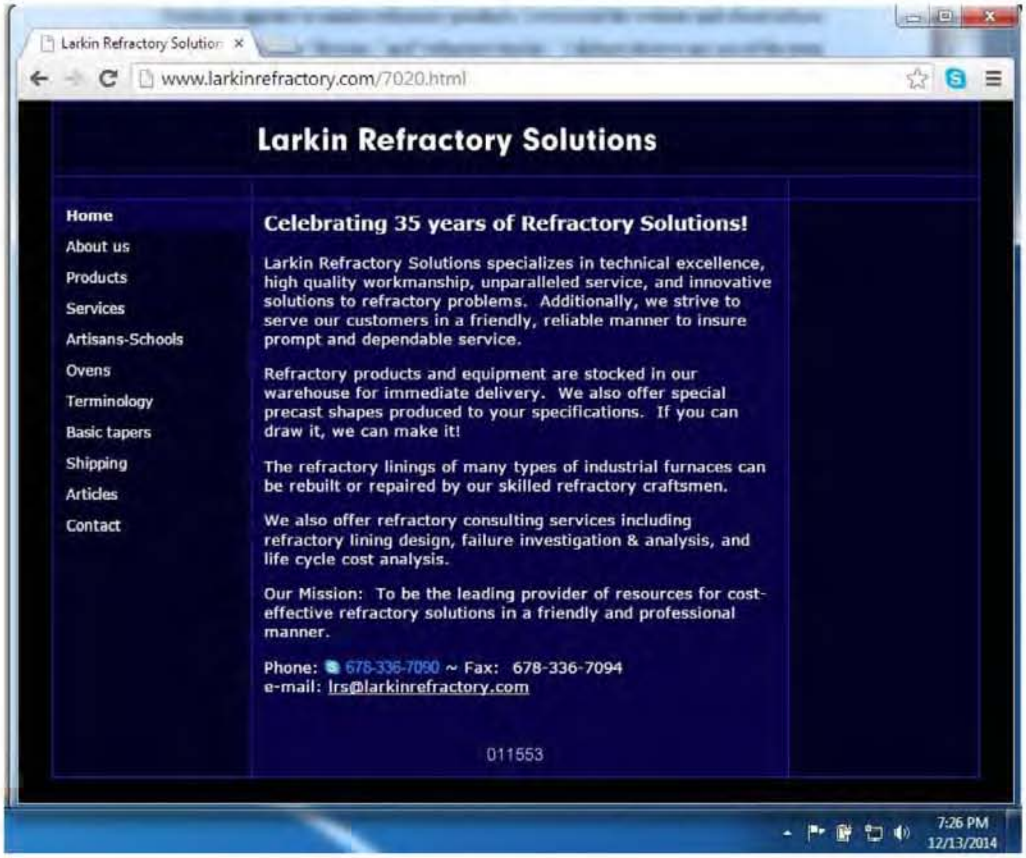
U.S. Application No. 85834316

Exhibit T


Larkin Refractory Solution
www.larkinrefractory.com/7020.html
Larkin Refractory Solutions
Home
About us
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Services
Artisans-Schools
Ovens
Terminology
Basic tapers
Shipping
Articles
Contact
Celebrating 35 years of Refractory Solutions!
Larkin Refractory Solutions specializes in technical excellence, high quality workmanship, unparalleled service, and innovative solutions to refractory problems. Additionally, we strive to serve our customers in a friendly, reliable manner to insure prompt and dependable service.
Refractory products and equipment are stocked in our warehouse for immediate delivery. We also offer special precast shapes produced to your specifications. If you can draw it, we can make it!
The refractory linings of many types of industrial furnaces can be rebuilt or repaired by our skilled refractory craftsmen.
We also offer refractory consulting services including refractory lining design, failure investigation & analysis, and life cycle cost analysis.
Our Mission: To be the leading provider of resources for cost-effective refractory solutions in a friendly and professional manner.
Phone: 678-336-7090 ~ Fax: 678-336-7094
e-mail: lrs@larkinrefractory.com
011553
7:26 PM
12/13/2014

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U.S. Application No. 85834316

Exhibit U

Larkin Refractory Solution
www.larkinrefractory.com/7218.html

Larkin Refractory Solutions

Home
About us
Products
Services
Artisans-Schools
Ovens
Terminology
Basic tapers
Shipping
Articles
Contact

Terminology:

Basic Firebrick sizes and shapes

Every business has a certain amount of terminology that is fairly specific to its field. The refractory industry is no exception; following is a brief list of the more common terms we use along with a brief description or definition:

Fire Brick - This is a generic term that covers a huge variety of hard (dense) and soft (insulating) materials that are typically either pressed or extruded and then fired. They come in various sizes and shapes as explained below:

Straights – The standard straight is 9" L x 4½" W x 2½" thick or 9"L x 4½"W x 3" thick. Straights are available in larger sizes up to 18" in length, 9" in width and 4½" in thickness.

Square Edge Tile – This term refers to "big" straights which comprise 12" x 12" up to 24" x 12" with thickness ranging from 1½" to 3".

Soaps – A term used to describe a half brick in width such as a 9" x 2¼" x 2½" or 9" x 2¼" x 3".

Splits – A term used to describe the thickness of a brick thinner than 2½", i.e. splits come in 1", 1¼", 1½", and 2" thicknesses.

Arch - This shape tapers in thickness along the width over its entire length and is used to make sprung or circular barrel arched roofs either 4½" or 6" in thickness. They are available in different tapers as follows:

In 2½ thick brick a #1 Arch tapers from 2½" to 2 ⅛"
#2 Arch tapers from 2½" to 1¾"
#3 Arch tapers from 2½" to 1"

In 3" thick brick a #1 Arch tapers from 3" to 2¾"
#2 Arch tapers from 3" to 2½"
#3 Arch tapers from 3" to 2"
#4 Arch tapers from 3" to 1"

Wedge - This shape tapers in thickness along the entire length of the brick and is used to make sprung or circular barrel arches 9", 12" & 13" in thickness. They are available in different tapers as follows:

In 2½" thick brick a #1XW tapers from 2½" to 2¼"
#1W tapers from 2½" to 1⅞"
#2W tapers from 2½" to 1½"
In 3" thick brick a #1W tapers from 3" to 2¾"

7:28 PM
12/13/2014

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Exhibit V

REFRACTORY FIRE BRICK
www.vitcas.com/refractory-fire-bricks
VITCAS
Refractories
Wholesale & Trade
International Co-Operation
DIY & Retail
Wood Fired Ovens
Online Shop
HOME
COMPANY
PRODUCTS
SECTORS
CONTACT US
MANUFACTURER OF REFRACTORIES & HEAT RESISTANT MATERIALS
REFRACTORY MATERIALS
REFRACTORY CASTABLES
PLASTIC MOULDABLE & RAMS REFRACTORIES
REFRACTORY CEMENT / MORTARS
REFRACTORY FIRE BRICKS
CHEMICAL & ACID RESISTANT CEMENT
FIRE CEMENTS & PUTTIES
ZIRCON REFRACTORIES
HIGH TEMPERATURE INSULATION
CERAMIC FIBRE INSULATION
ROPES, TAPES & TEXTILES INSULATION
FLUE INSULATION WRAP
VERMICULITE INSULATION
CALCIUM SILICATE
REFRACTORY FIRE BRICKS
A firebrick is a block of refractory ceramic material used in lining furnaces, kilns, fireboxes, and fireplaces. A refractory brick is designed mainly to withstand high heat, but should also usually have a low thermal conductivity to save energy. Usually dense fire bricks are used in applications with extreme mechanical, chemical, or thermal stresses, such as the inside of a wood-fired kiln or a furnace, which is subject to abrasion from wood, fluxing from ash or slag, and high temperatures. Dense fire bricks have a high thermal mass which is sometimes a useful property in that they will retain heat eg in a pizza oven after the fire has been taken out. Fire bricks are made by firing a clay based composition in the kiln until it is partly vitrified, and for special purposes may also be glazed. Fire bricks usually contain 30-40% alumina and the primary raw material is usually chamotte with other materials. The maximum service temperature increases with increasing alumina content and bricks can be obtained with an alumina content of 80% and above.
Search
NEWS & EVENTS
Range of Adhesives for Firebords
We have just introduced three new products which are for use with our fireboards. Vitcas BA Board Adhesive and Hardener Hardener is used for hardening the surface and edges of Vitcas CS Fireplace Construction Boards; Board Adhesive is used for connecting the boards together and for attaching them to the wall.
read more news
OUR PRODUCTS
OUTDOOR OVEN CEMENT
7:37 PM
12/13/2014

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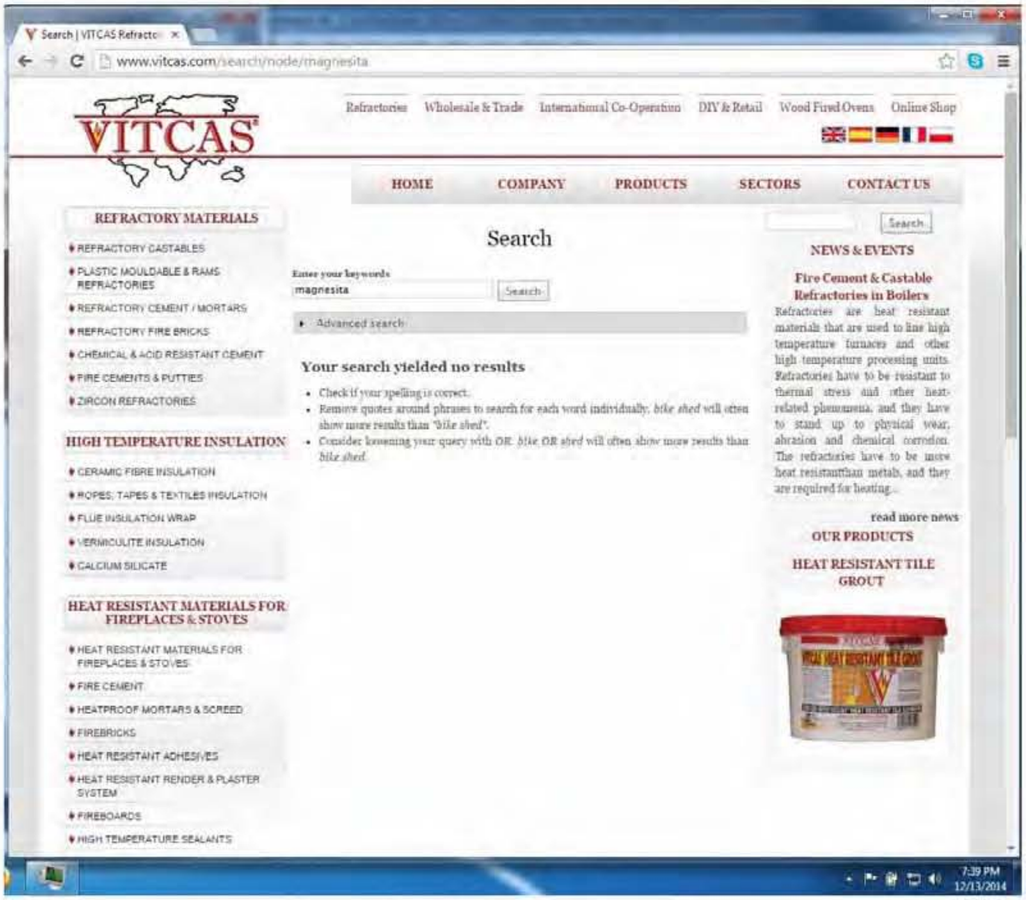
Exhibit W


Search | VITCAS Refracto
www.vitcas.com/search/node/magnesita
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REFRACTORY CASTABLES
PLASTIC MOULDABLE & RAMS REFRACTORIES
REFRACTORY CEMENT / MORTARS
REFRACTORY FIRE BRICKS
CHEMICAL & ACID RESISTANT CEMENT
FIRE CEMENTS & PUTTIES
ZIRCON REFRACTORIES
HIGH TEMPERATURE INSULATION
CERAMIC FIBRE INSULATION
ROPES, TAPES & TEXTILES INSULATION
FLUE INSULATION WRAP
VERMICULITE INSULATION
CALCIUM SILICATE
HEAT RESISTANT MATERIALS FOR FIREPLACES & STOVES
HEAT RESISTANT MATERIALS FOR FIREPLACES & STOVES
FIRE CEMENT
HEATPROOF MORTARS & SCREED
FIREBRICKS
HEAT RESISTANT ADHESIVES
HEAT RESISTANT RENDER & PLASTER SYSTEM
FIREBOARDS
HIGH TEMPERATURE SEALANTS
Search
Enter your keywords
magnesita
Search
Advanced search
Your search yielded no results
Check if your spelling is correct.
Remove quotes around phrases to search for each word individually. bike shed will often show more results than "bike shed".
Consider loosening your query with OR. bike OR shed will often show more results than bike shed.
Search
NEWS & EVENTS
Fire Cement & Castable Refractories in Boilers
Refractories are heat resistant materials that are used to line high temperature furnaces and other high temperature processing units. Refractories have to be resistant to thermal stress and other heat-related phenomena, and they have to stand up to physical wear, abrasion and chemical corrosion. The refractories have to be more heat resistantthan metals, and they are required for heating...
read more news
OUR PRODUCTS
HEAT RESISTANT TILE GROUT
7:39 PM
12/13/2014

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U.S. Application No. 85834316

Exhibit X

The Nock Refractories Co.

www.nockrefractories.com

REFRACTORIES NOCK INSULATIONS

"Dedicated to Quality and Excellence of Service Since 1912"

THE NOCK REFRACTORIES CO.

1243 East 55th Street

Cleveland, OH 44103

(216)431-2500 Fax: (216)431-5330

1-800-ITS-NOCK (487-6625)

Contact Us

Serving industry since 1912, The Nock Refractories Co. is a third generation, family owned and
operated business, providing more than 100 years of collective experience as a full-line warehouse
distributor of refractories and high-temperature insulation.

We have combined product innovation with technical service to become recognized throughout industry as "problem solvers" for many industrial applications.
Some of our "in-stock" products include:

Fire Brick/Insulating Fire Brick

7:46 PM 12/13/2014

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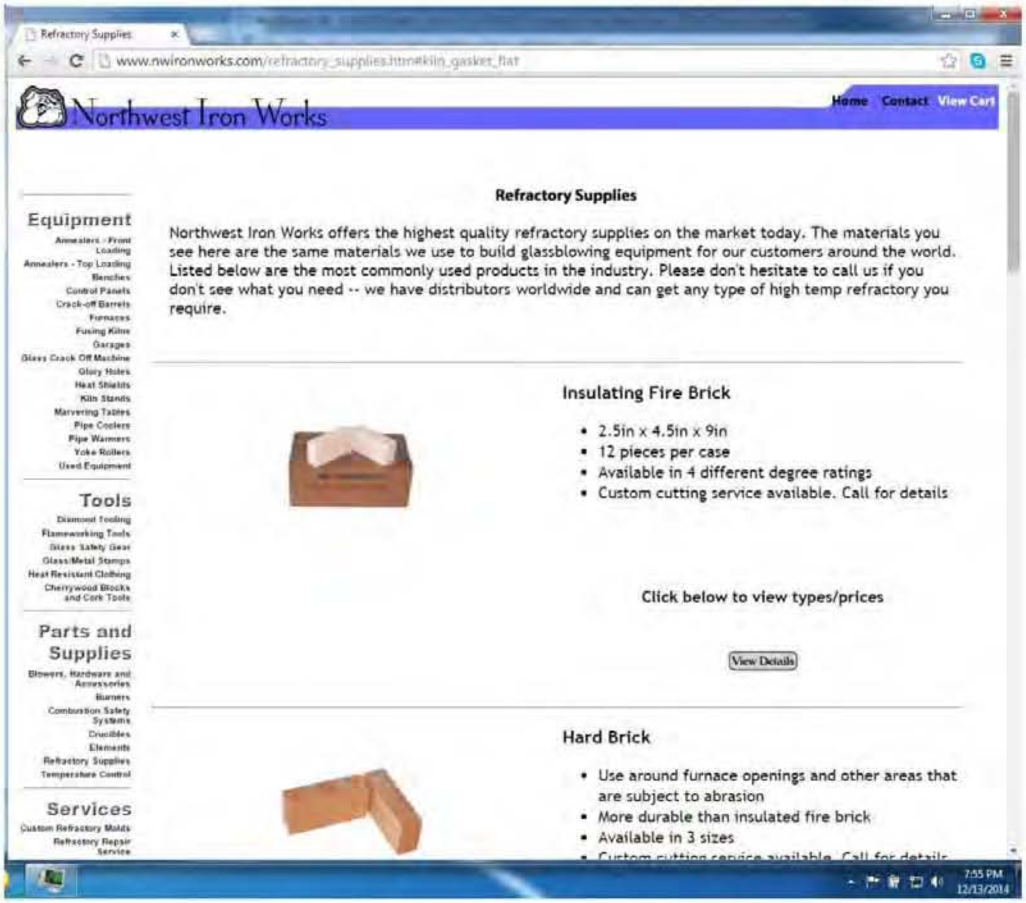
Exhibit Y


Refractory Supplies

www.nwironworks.com/refractory_supplies.htm#kiln_gasket_flat

Northwest Iron Works

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Equipment
Annealers - Front Loading
Annealers - Top Loading
Benches
Control Panels
Crack-off Barrels
Furnaces
Fusing Kilns
Garages
Glass Crack Off Machine
Glory Holes
Heat Shields
Kiln Stands
Marvering Tables
Pipe Coolers
Pipe Warmers
Yoke Rollers
Used Equipment

Tools
Diamond Tooling
Flameworking Tools
Glass Safety Gear
Glass/Metal Stamps
Heat Resistant Clothing
Cherrywood Blocks and Cork Tools

Parts and Supplies
Blowers, Hardware and Accessories
Burners
Combustion Safety Systems
Crucibles
Elements
Refractory Supplies
Temperature Control

Services
Custom Refractory Molds
Refractory Repair Service

Refractory Supplies

Northwest Iron Works offers the highest quality refractory supplies on the market today. The materials you see here are the same materials we use to build glassblowing equipment for our customers around the world. Listed below are the most commonly used products in the industry. Please don't hesitate to call us if you don't see what you need -- we have distributors worldwide and can get any type of high temp refractory you require.

Insulating Fire Brick

- 2.5in x 4.5in x 9in
- 12 pieces per case
- Available in 4 different degree ratings
- Custom cutting service available. Call for details

Click below to view types/prices

View Details

Hard Brick

- Use around furnace openings and other areas that are subject to abrasion
- More durable than insulated fire brick
- Available in 3 sizes
- Custom cutting service available. Call for details

7:55 PM
12/13/2014

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Exhibit Z

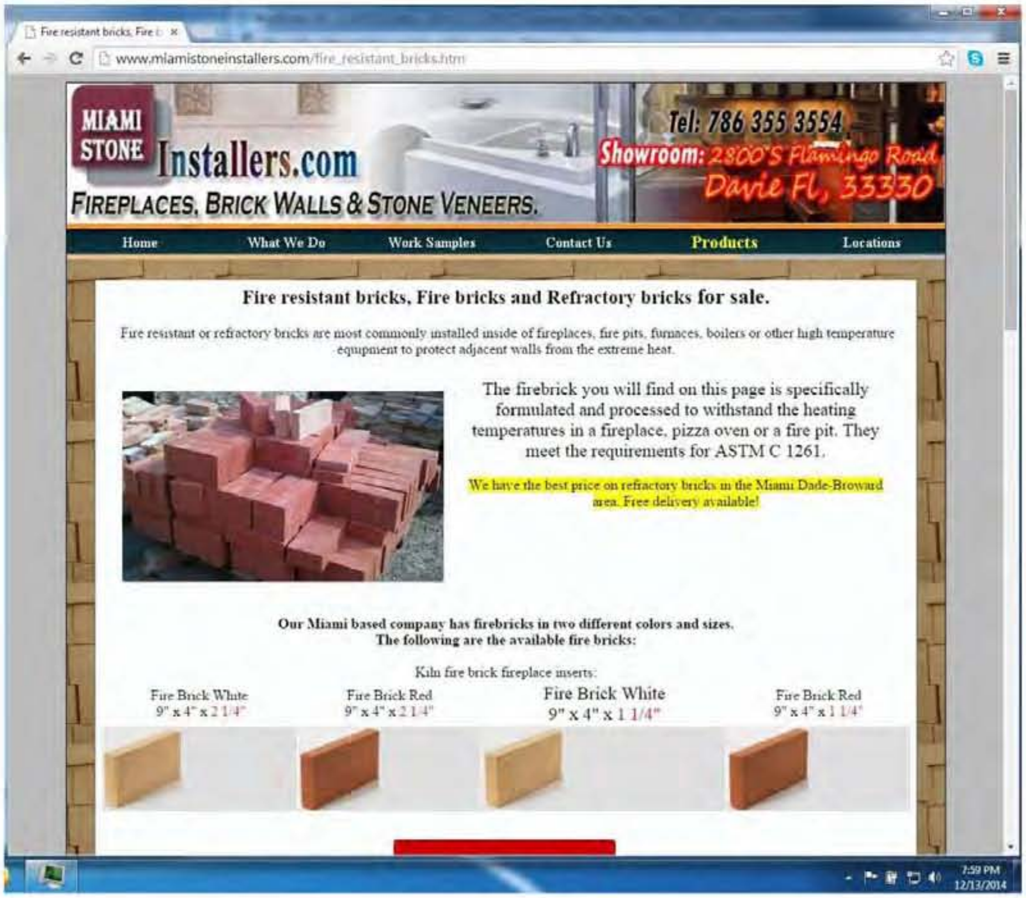
Fire resistant bricks, Fire b
www.miamistoneinstallers.com/fire_resistant_bricks.htm
MIAMI STONE Installers.com
FIREPLACES, BRICK WALLS & STONE VENEERS.
Tel: 786 355 3554
Showroom: 2800'S Flamingo Road Davie Fl, 33330
Home
What We Do
Work Samples
Contact Us
Products
Locations
Fire resistant bricks, Fire bricks and Refractory bricks for sale.
Fire resistant or refractory bricks are most commonly installed inside of fireplaces, fire pits, furnaces, boilers or other high temperature equipment to protect adjacent walls from the extreme heat.
The firebrick you will find on this page is specifically formulated and processed to withstand the heating temperatures in a fireplace, pizza oven or a fire pit. They meet the requirements for ASTM C 1261.
We have the best price on refractory bricks in the Miami Dade-Broward area. Free delivery available!
Our Miami based company has firebricks in two different colors and sizes.
The following are the available fire bricks:
Kiln fire brick fireplace inserts:
Fire Brick White 9" x 4" x 2 1/4"
Fire Brick Red 9" x 4" x 2 1/4"
Fire Brick White 9" x 4" x 1 1/4"
Fire Brick Red 9" x 4" x 1 1/4"
7:59 PM
12/13/2014

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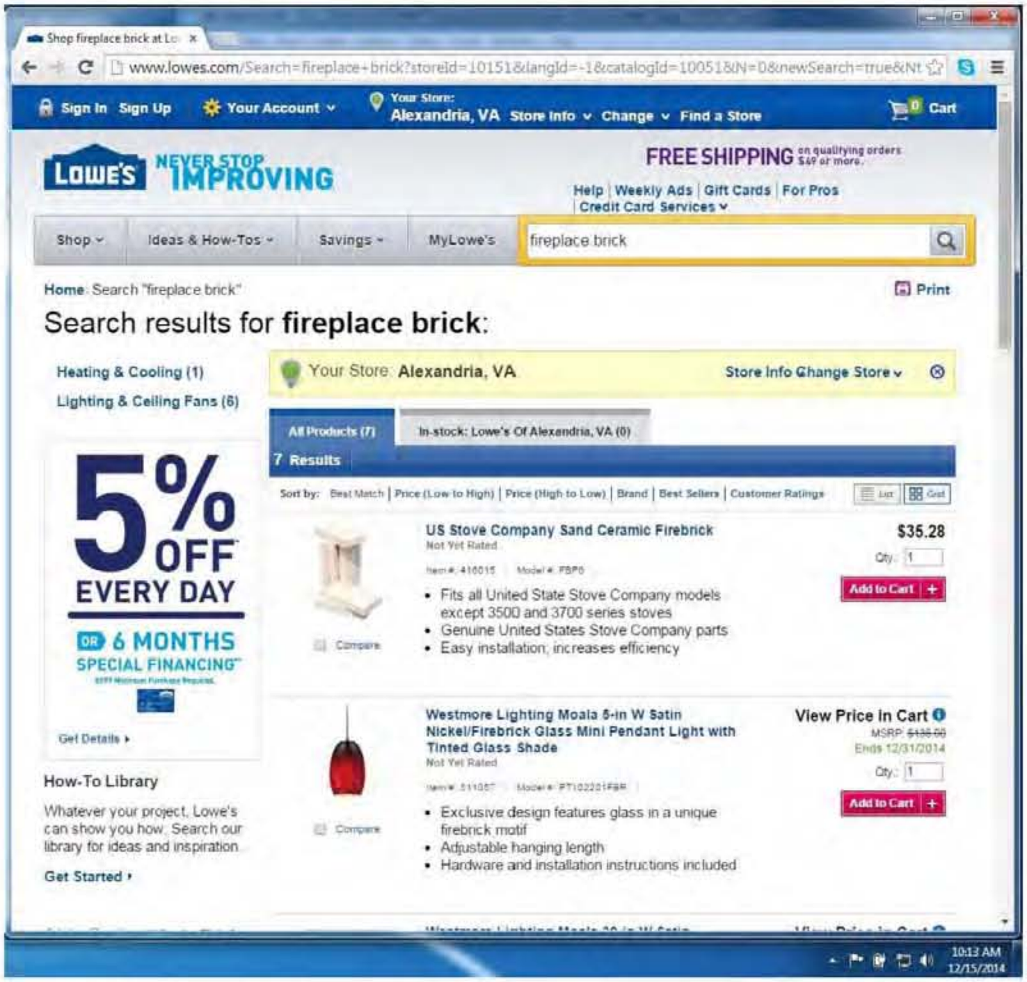
Exhibit AA


Shop fireplace brick at Lo
www.lowes.com/Search=fireplace+brick?storeId=10151&langId=-1&catalogId=10051&N=0&newSearch=true&Nt
Sign In Sign Up
Your Account
Your Store:
Alexandria, VA Store Info Change Find a Store
Cart
LOWE'S NEVER STOP IMPROVING
FREE SHIPPING on qualifying orders $49 or more.
Help Weekly Ads Gift Cards For Pros
Credit Card Services
Shop Ideas & How-Tos Savings MyLowe's
fireplace brick
Home: Search "fireplace brick"
Print
Search results for fireplace brick:
Heating & Cooling (1)
Lighting & Ceiling Fans (6)
5% OFF EVERY DAY
OR 6 MONTHS SPECIAL FINANCING
Get Details
How-To Library
Whatever your project, Lowe's can show you how. Search our library for ideas and inspiration.
Get Started
Your Store: Alexandria, VA
Store Info Change Store
All Products (7)
In-stock: Lowe's Of Alexandria, VA (0)
7 Results
Sort by: Best Match | Price (Low to High) | Price (High to Low) | Brand | Best Sellers | Customer Ratings
US Stove Company Sand Ceramic Firebrick
Not Yet Rated
$35.28
Qty: 1
Add to Cart
Fits all United State Stove Company models except 3500 and 3700 series stoves
Genuine United States Stove Company parts
Easy installation; increases efficiency
Compare
Westmore Lighting Moala 5-in W Satin Nickel/Firebrick Glass Mini Pendant Light with Tinted Glass Shade
Not Yet Rated
View Price in Cart
Ends 12/31/2014
Qty: 1
Add to Cart
Exclusive design features glass in a unique firebrick motif
Adjustable hanging length
Hardware and installation instructions included
Compare
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12/15/2014

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U.S. Application No. 85834316

Exhibit AB

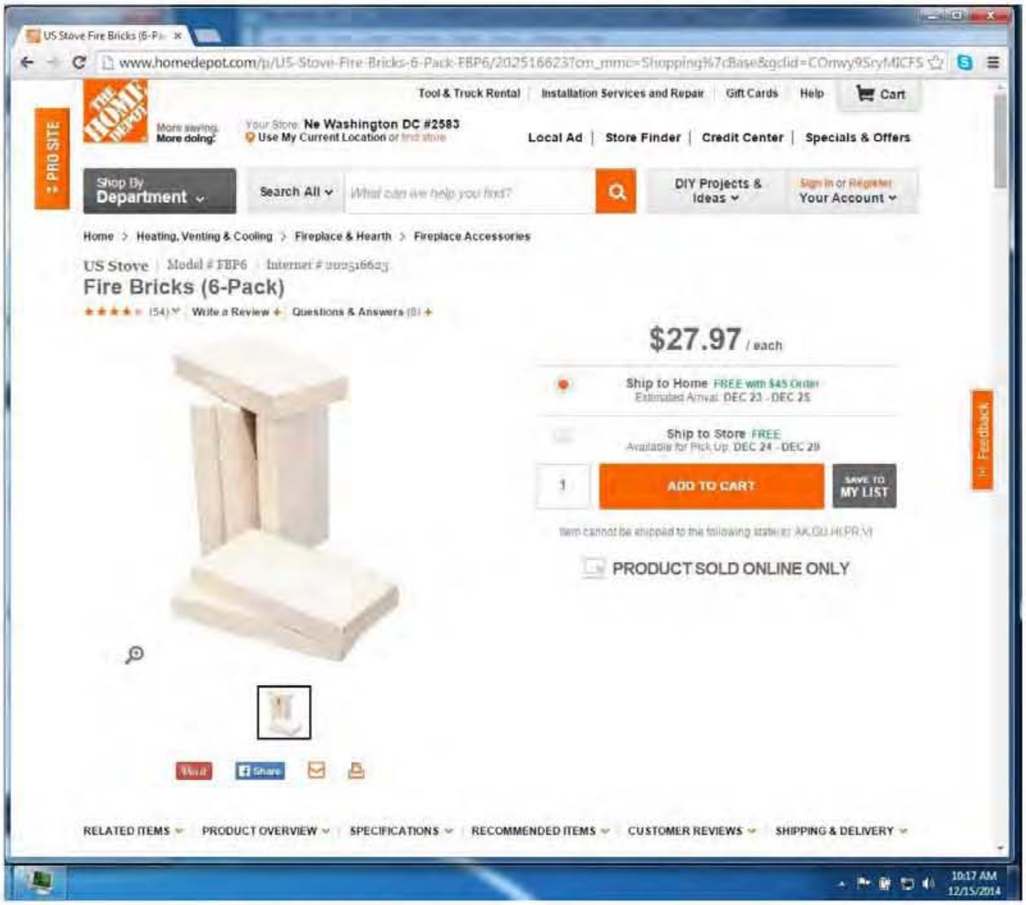
www.homedepot.com/p/US-Stove-Fire-Bricks-6-Pack-FBP6/202516623?cm_mmc=Shopping%7cBase&gclid=COmwy9SryMICFS
Tool & Truck Rental
Installation Services and Repair
Gift Cards
Help
Cart
Your Store: Ne Washington DC #2583
Use My Current Location or find store
Local Ad
Store Finder
Credit Center
Specials & Offers
Shop By Department
Search All
DIY Projects & Ideas
Sign In or Register
Your Account
Home > Heating, Venting & Cooling > Fireplace & Hearth > Fireplace Accessories
US Stove
Model # FBP6
Fire Bricks (6-Pack)
(54)
Write a Review
Questions & Answers
$27.97 / each
Ship to Home
Ship to Store FREE
ADD TO CART
SAVE TO MY LIST
PRODUCT SOLD ONLINE ONLY
RELATED ITEMS
PRODUCT OVERVIEW
SPECIFICATIONS
RECOMMENDED ITEMS
CUSTOMER REVIEWS
SHIPPING & DELIVERY
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Exhibit AC

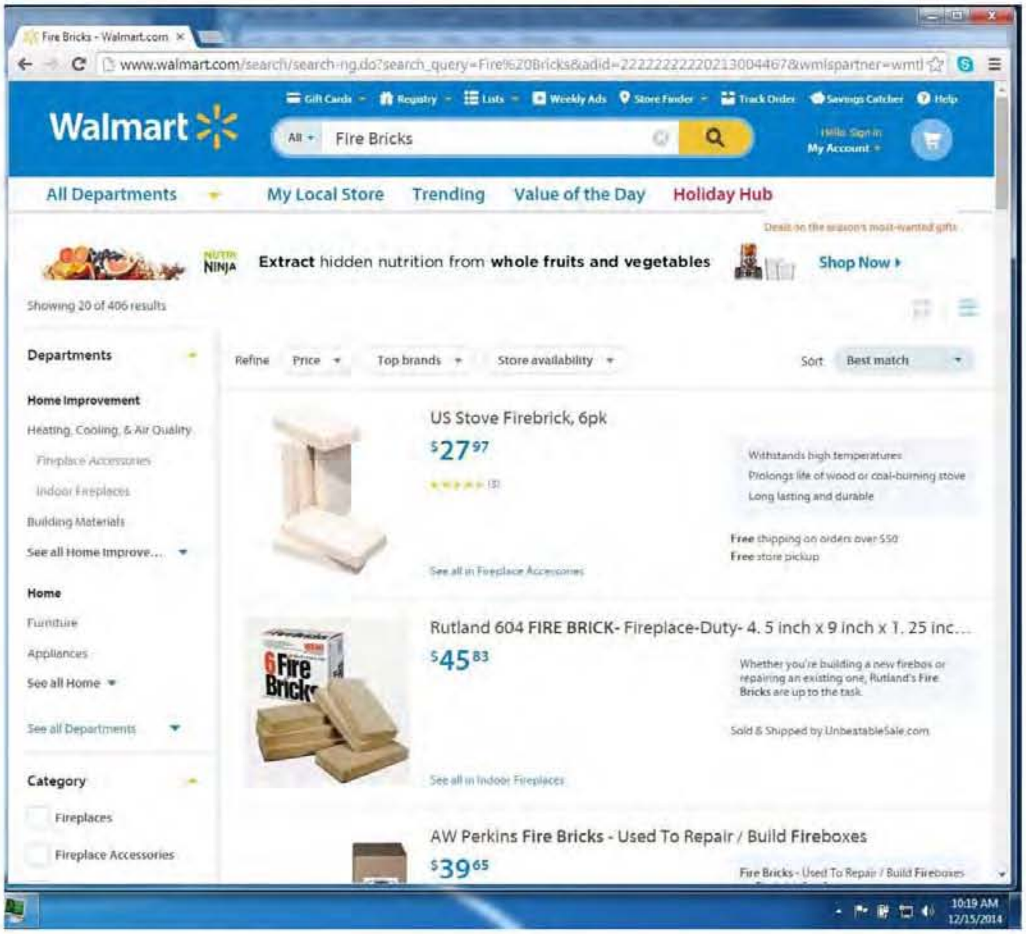
Fire Bricks - Walmart.com
www.walmart.com/search/search-ng.do?search_query=Fire%20Bricks&adid=22222222220213004467&wmlspartner=wmtl
Walmart
Fire Bricks
All Departments
My Local Store
Trending
Value of the Day
Holiday Hub
Extract hidden nutrition from whole fruits and vegetables
Shop Now
Showing 20 of 406 results
Departments
Home Improvement
Heating, Cooling, & Air Quality
Building Materials
Home
Furniture
Appliances
See all Home
See all Departments
Category
Fireplaces
Fireplace Accessories
Refine
Price
Top brands
Store availability
Sort
Best match
US Stove Firebrick, 6pk
$27.97
Withstands high temperatures
Prolongs life of wood or coal-burning stove
Long lasting and durable
Free shipping on orders over $50
Free store pickup
See all in Fireplace Accessories
Rutland 604 FIRE BRICK- Fireplace-Duty- 4. 5 inch x 9 inch x 1. 25 inc...
$45.83
Whether you're building a new firebox or repairing an existing one, Rutland's Fire Bricks are up to the task.
Sold & Shipped by UnbeatableSale.com
See all in Indoor Fireplaces
6 Fire Bricks
AW Perkins Fire Bricks - Used To Repair / Build Fireboxes
$39.65
Fire Bricks - Used To Repair / Build Fireboxes
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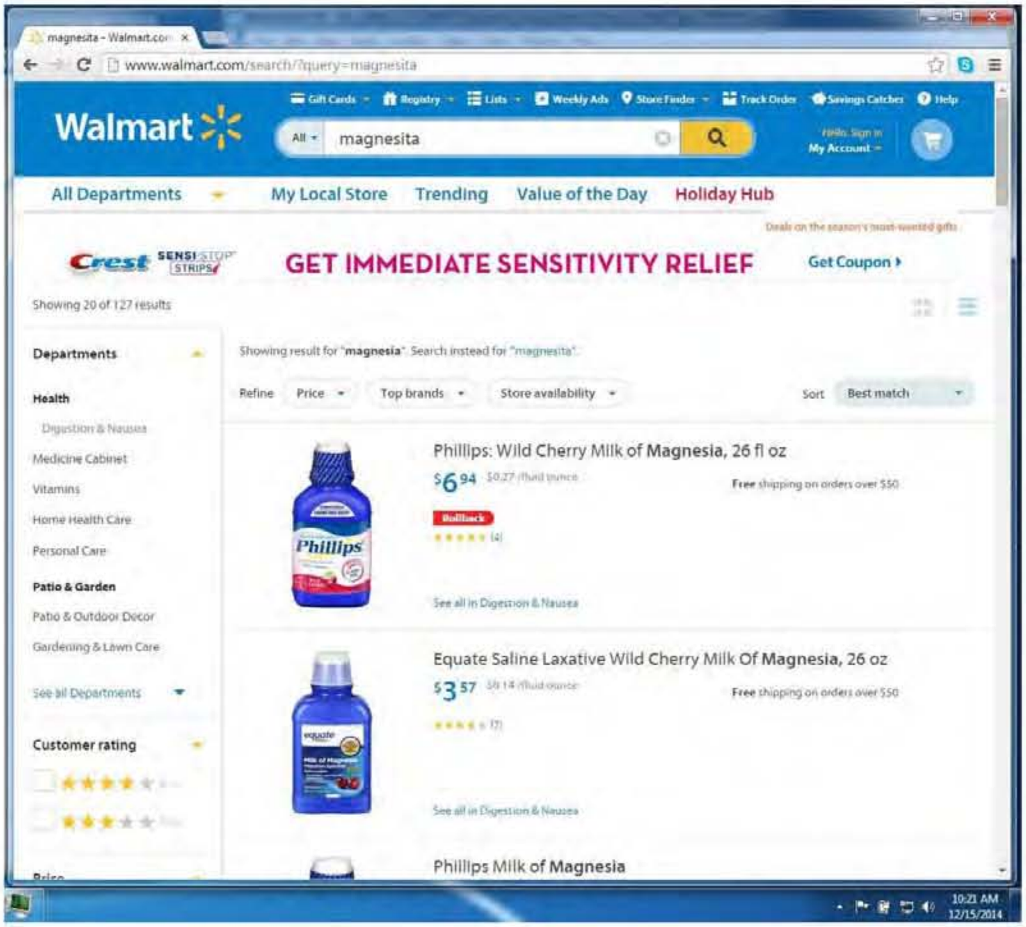
Exhibit AD


magnesita - Walmart.com
www.walmart.com/search/?query=magnesita
Walmart
magnesita
All Departments
My Local Store
Trending
Value of the Day
Holiday Hub
Crest SENSI-STOP STRIPS
GET IMMEDIATE SENSITIVITY RELIEF
Get Coupon
Showing 20 of 127 results
Departments
Health
Medicine Cabinet
Vitamins
Home Health Care
Personal Care
Patio & Garden
Patio & Outdoor Decor
Gardening & Lawn Care
Customer rating
Showing result for "magnesia". Search instead for "magnesita".
Refine
Price
Top brands
Store availability
Sort
Best match
Phillips: Wild Cherry Milk of Magnesia, 26 fl oz
$6 94
Free shipping on orders over $50
Rollback
See all in Digestion & Nausea
Equate Saline Laxative Wild Cherry Milk Of Magnesia, 26 oz
$3 57
Free shipping on orders over $50
See all in Digestion & Nausea
Phillips Milk of Magnesia
10:21 AM
12/15/2014

DECLARATION ABOUT EXCLUSIVE USE
U.S. Application No. 85834316

Exhibit AE

Amazon.com: fire bricks
www.amazon.com/s/?ie=UTF8&keywords=fire+bricks&tag=googhydr-20&index=aps&hvadid=31417040685&hvpos=1t3
amazon
Your Amazon.com
Today's Deals
Gift Cards
Sell
Help
Shop by Department
Search
All
fire bricks
Go
Hello. Sign in Your Account
Try Prime
Cart
Wish List
1-16 of 8,667 results for "fire bricks"
Sign in
Choose a Department to sort
Show results for
Related Searches: bricks, wood stove fire bricks.
Home & Kitchen
Fireplaces & Accessories
Fireplace Parts & Accessories
Fireplace Grates
Fireplace Log Carriers & Holders
Window Treatment Panels
Tools & Home Improvement
Welding & Soldering Parts & Accessories
Heating & Cooling Ducting Products
Furnace Filters
Fire Extinguishers
Soldering Accessories
Arts, Crafts & Sewing
Ceramics Glazes
Stained Glass Making Supplies
Art Paints
Industrial & Scientific
Contact Cements
Adhesive Caulk
Industrial Sealants
Kitchen & Dining
Pizza Pans & Stones
Tablecloths
+ See All 38 Departments
Refine by
Eligible for Free Shipping
Free Shipping by Amazon
Rutland Duty Fire Bricks, 9 by 4-1/2 by 1-1/4-Inch
by Rutland
$39.94 Prime
Get it by Tuesday, Dec 16
More Buying Choices
$21.23 new (12 offers)
6 Fire Bricks
FREE Shipping
Product Features
Tools & Home Improvement: See all 200 items
US Stove FBP6 Firebrick, Pack of 6
$27.97 Prime
Get it by Tuesday, Dec 16
More Buying Choices
$18.00 new (16 offers)
$20.62 used (2 offers)
Product Features
Industrial & Scientific: See all 107 items
MEECO'S RED DEVIL 1004 Creosote Control Firebrick
$22.28 Prime
Get it by Tuesday, Dec 16
More Buying Choices
$13.35 new (13 offers)
$11.34 used (1 offer)
Product Features
Home & Kitchen: See all 496 items
Rutland 12.5 lbs Tub Castable Cement - Mix With Water (Fire Clay) 2200 degree
by Rutland
$40.50 Prime
More Buying Choices
Refractory Cement
FREE Shipping
Product Features
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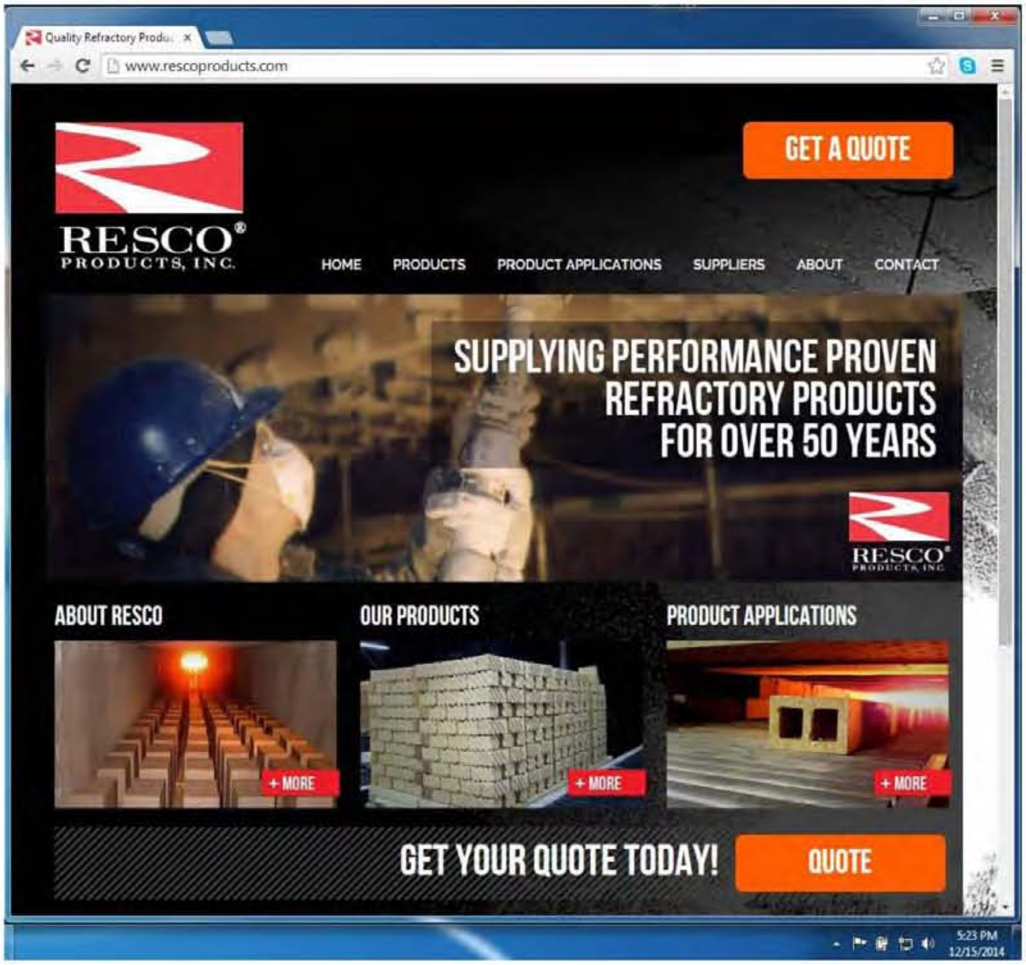
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PRODUCT APPLICATIONS
+ MORE
+ MORE
+ MORE
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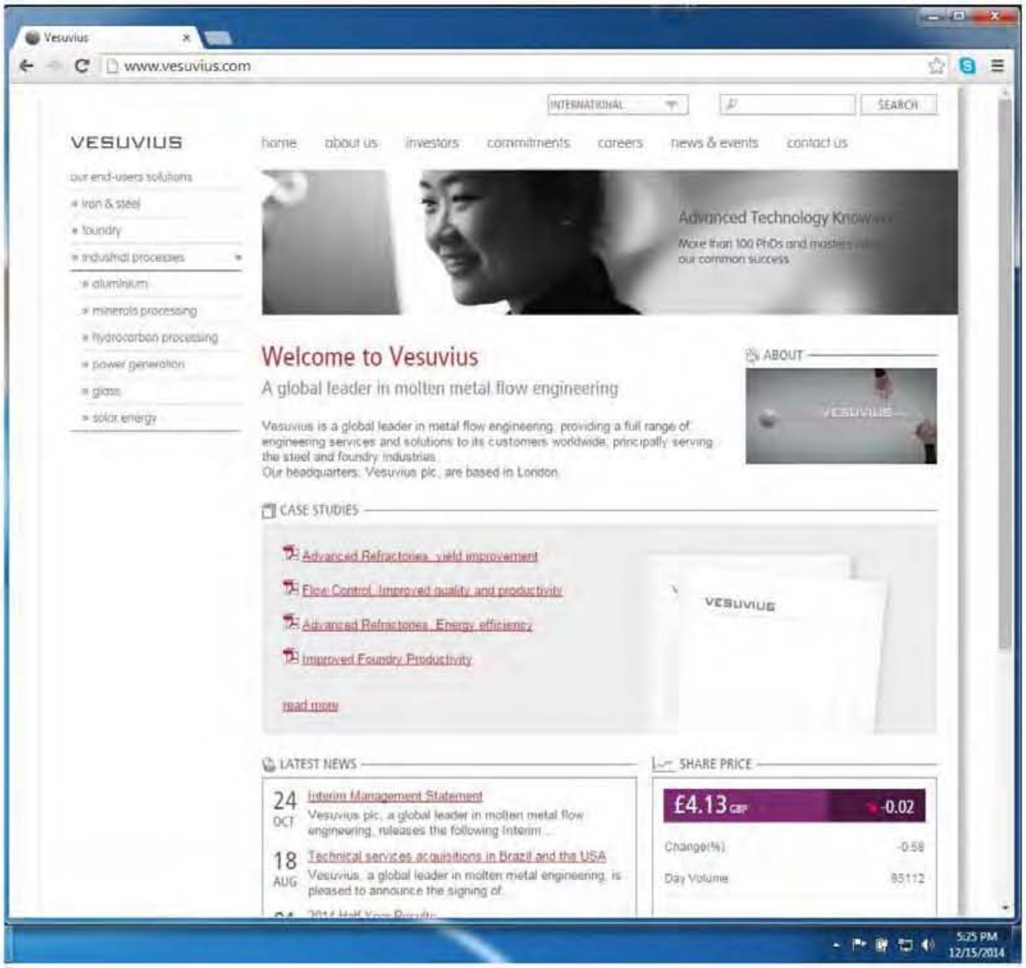
12/15/2014

DECLARATION ABOUT EXCLUSIVE USE
U.S. Application No. 85834316

Exhibit AG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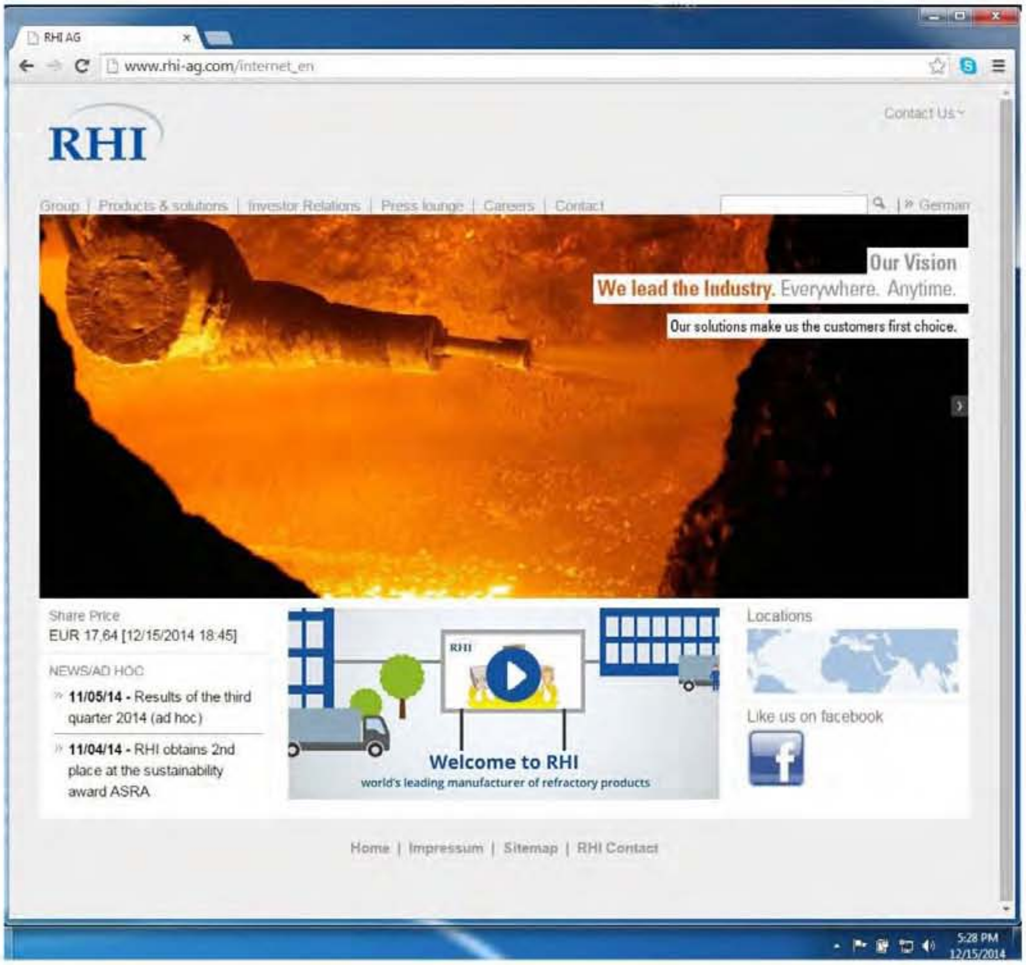
DECLARATION ABOUT EXCLUSIVE USE
U.S. Application No. 85834316

Exhibit AH



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DECLARATION ABOUT EXCLUSIVE USE
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Exhibit AI

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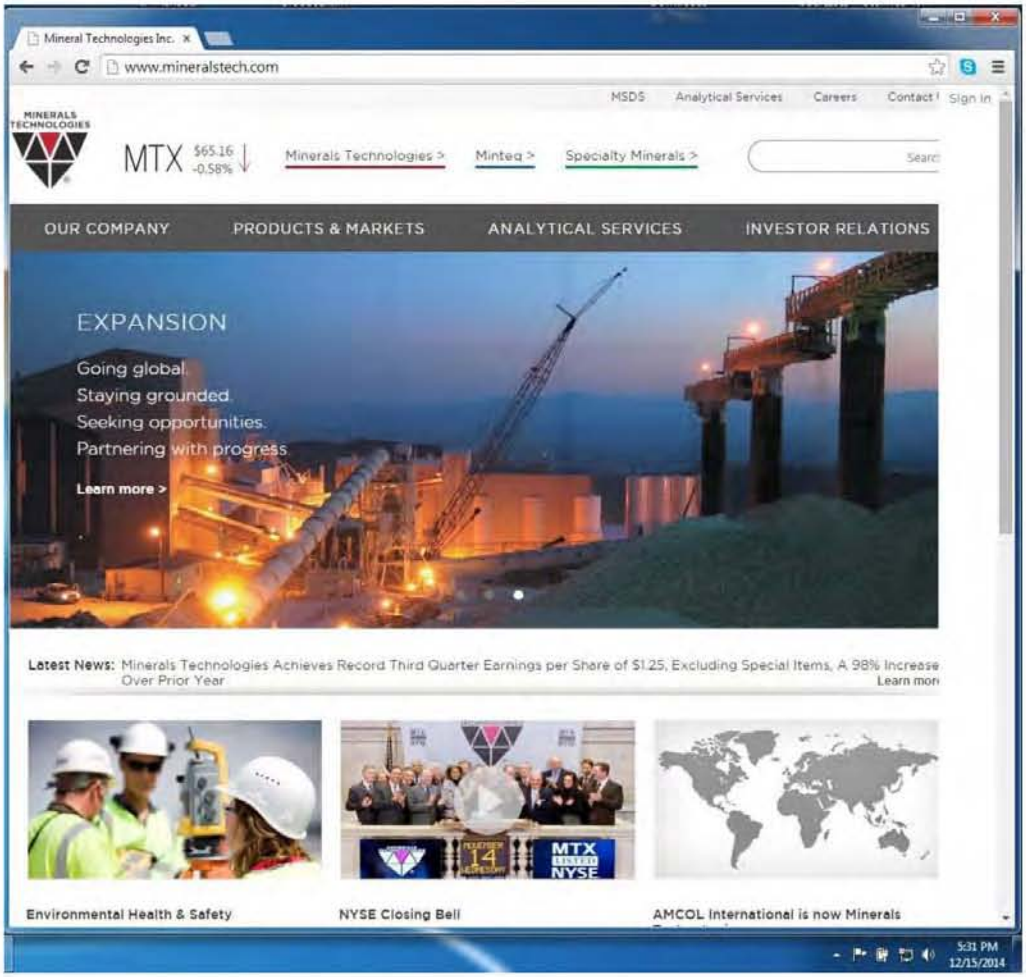
DECLARATION ABOUT EXCLUSIVE USE
U.S. Application No. 85834316

Exhibit AJ



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12/15/2014

Trademark Trial and Appeal Board Electronic Filing System. http://estta.uspto.gov

ESTTA Tracking number: **ESTTA670924**

Filing date: **05/07/2015**

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

Application Serial No.	85834316
Applicant	Magnesita Refractories Company

Notice of Appeal

Notice is hereby given that Magnesita Refractories Company appeals to the Trademark Trial and Appeal Board the refusal to register the mark depicted in Application Serial No. 85834316.

Applicant has filed a request for reconsideration of the refusal to register, and requests suspension of the appeal pending consideration of the request by the Examining Attorney.

The refusal to register has been appealed as to the following classes of goods/services:

- Class 019. First Use: 2008/10/00 First Use In Commerce: 2008/10/00
  All goods and services in the class are appealed, namely: refractory products not primarily of metal, namely, refractory bricks, refractory mixes for patching, lining or repairing high temperature apparatus and repairing the lining for furnaces, refractory furnace patching and repair mixes; and pre-cast refractory shapes
- Class 037. First Use: 2008/10/00 First Use In Commerce: 2008/10/00
  All goods and services in the class are appealed, namely: providing information via a global computer network on the use of refractory products to construct, maintain and repairrefractory apparatus using refractory products; and providing information via aglobal computer network on the use of mechanical equipment and computer models to construct, maintain and repair refractory installations

Respectfully submitted,
/Thomas J. Moore/
05/07/2015

THOMAS J. MOORE

BACON & THOMAS, PLLC

625 SLATERS LN FL 4

ALEXANDRIA, VA 22314-1169

UNITED STATES

mail@baconthomas.com

703-683-0500

From: Feldman-Lehker, Dawn

Sent: 5/14/2015 9:53:09 AM

To: TTAB EFiling

CC:

Subject: U.S. TRADEMARK APPLICATION NO. 77873477 - MAGNESITA - MAGN6002/TJM - EXAMINER BRIEF

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Attachment Information:

Count: 1

Files: 77873477.doc

UNITED STATES PATENT AND TRADEMARK OFFICE (USPTO)

U.S. APPLICATION SERIAL NO. 77873477

MARK: MAGNESITA

CORRESPONDENT ADDRESS:
THOMAS J MOORE
BACON & THOMAS PLLC
625 SLATERS LN 4TH FLOOR
ALEXANDRIA, VA 22314-1176

GENERAL TRADEMARK INFORMATION:

http://www.uspto.gov/trademarks/index.jsp

TTAB INFORMATION:

http://www.uspto.gov/trademarks/process/appeal/index.jsp

APPLICANT: MAGNESITA REFRACTORIES COMPANY

CORRESPONDENT'S REFERENCE/DOCKET NO:

MAGN6002/TJM

CORRESPONDENT E-MAIL ADDRESS:

mail@baconthomas.com

EXAMINING ATTORNEY'S APPEAL BRIEF

INTRODUCTION

In this case the Applicant appeals the Trademark Examining Attorney's Final Refusal of the proposed mark, MAGNESITA, for "Refractory products not made primarily of metal, namely, refractory bricks, refractory mixes for patching, lining or repairing high temperature apparatus and repairing the lining for furnaces, refractory furnace patching and repair mixes." Registration has been finally refused because the proposed mark appears to be generic as applied to the proposed goods. Alternatively, registration has also been refused because the mark is descriptive of the applicant's goods under Section 2(e)(1), 15 U.S.C. §1052(e)(1). Moreover, because of the highly descriptive nature of the proposed mark when used in connection with the goods named in the application, the Section 2(f) claim of acquired distinctiveness under the Trademark Act fails due to the insufficiency of proof to overcome the refusal of registration.

The application also includes the following services in International Class 37, "Providing information via a global computer network on constructing, maintaining, and repairing refractory apparatus using refractory products." The examining attorney has stated on the record that the proposed mark is acceptable on the Supplemental Register for the services in International Class 37.

The examining attorney respectfully requests that the Board affirm the refusal to register the proposed mark.

STATEMENT OF THE CASE

On November 16, 2009, the applicant filed an application for the mark, MAGNESITA, for the following goods and services, "Refractory products, namely, refractory bricks, refractory mixes for patching, lining or repairing high temperature apparatus and repairing the lining for furnaces, refractory furnace patching and repair mixes," and "Computerized online commercial stores featuring refractory products by means of the Internet" and "Providing information via a global computer network on the use of refractory products to construct, maintain and repair refractory apparatus." On February 22, 2010, the examining attorney issued and office action requiring that the applicant pay for two of the three classes listed in the application, amend the recitation of services in International Class 35 and provide a translation of the proposed mark.

In response to the original office action, on March 18, 2010, the applicant paid the fee for two classes of services, amended the recitation of services in International Class 35 and provided a translation of the mark. On March 30, 2010 the examining attorney issued an examiner's amendment to put the translation statement in the proper format. Also on March 30, 2010, the examining attorney issued a refusal under Section 2(e)(1) of the Trademark Act because the proposed mark was descriptive of the goods and services based on the translation of the proposed mark.

On September 27, 2010, the applicant responded to the refusal to register the proposed mark under Section 2(e)(1) of the Trademark Act. On November 5, 2010, the examining attorney continued the refusal under Section 2(e)(1) and continued the requirement that the applicant properly amend the recitation of services in International Class 35.

On April 29, 2011, the applicant responded to the continuing refusal to register. The response resolved the recitation of services issue but did not resolve the refusal to register under Section 2(e)(1). On May 27, 2010, the examining attorney issued a Final Refusal under Section 2(e)(1).

On June 13, 2011, the applicant filed a response to the Final Refusal as well as an Amendment to Allege Use. In the response, the applicant deleted the services in International Class 35 and requested reconsideration of the refusal stating that the filing of the Amendment to Allege Use for the goods and services in International Classes 19 and 37 raised a new issue.

On June 23, 2011, the examining attorney issued a new non-final office action because the Amendment to Allege Use raised a new issue in the application. The specimens of use for the services in International Class 37 were unacceptable. The refusal under Section 2(e)(1) was maintained and continued. On December 15, 2011, the applicant responded to the refusal of the specimens by demonstrating how the specimens actually advertised the services and submitted arguments to overcome the refusal under Section 2(e)(1).

On January 9, 2012, the examining attorney, once again issued a Final Refusal under Section 2(e)(1) and a Final Refusal of the specimens of use in International Class 37. On January 12, 2012, the applicant responded to the Final Refusal of the specimens by stating that the same specimens had been accepted for International Class 37 in another registration and argued against the refusal under Section 2(e)(1).

On February 1, 2012, the examining attorney withdrew the Final Refusal because she had overlooked an issue with the indefinite recitation of services in International Class 37 that should have been addressed earlier. She continued the refusal under Section 2(e)(1) and the requirement for new specimens. On July 26, 2012, the applicant responded to the office action by amending the recitation of services in International Class 37.

On August 28, 2012, the examining attorney once again issued a Final Refusal under Section 2(e)(1). The recitation of services had been made of record. On February 22, 2013, the applicant responded to the Final Refusal by submitting a claim of acquired distinctiveness under Section 2(f).

On March 28, 2013, the examining attorney once again withdrew the Final Refusal because the applicant's Section 2(f) claim raised a new issue. The refusal under Section 2(e)(1) was maintained and continued and the examining attorney addressed the Section 2(f) claim and addressed another identification of goods issue that was previously overlooked.

On September 20, 2013, the applicant responded by amending the identification of goods in International Class 19 and provided arguments supporting the Section 2(f) claim of acquired distinctiveness. The applicant also submitted a voluntary amendment on September 30, 2013, supporting the Section 2(f) claim of acquired distinctiveness.

On October 4, 2014 the examining attorney issued a Final Refusal of the Section 2(f) claim and maintained the Final Refusal under Section 2(e)(1). On March 14, 2014 the applicant submitted a request for reconsideration of the Final Refusal. On March 27, 2014, the examining attorney denied the applicant's request for reconsideration.

On March 29, 2014, the applicant amended the application to the Supplemental Register. On May 27, 2014, the examining attorney withdrew the Final Refusal because the applicant's response raised a new issue. The examining attorney refused registration on the Supplemental Register in International Class 19 because the proposed mark was generic for the goods. Amendment to the Supplemental Register for the mark for the services in International Class 37 was acceptable.

On June 4, 2014, the applicant responded to the refusal on the Supplemental Register for the goods in International Class 19. On July 18, 2014, the examining attorney issued a Final Refusal on the Supplemental Register for the mark for the goods listed in International Class 19 because the mark was generic. On December 17, 2014, the applicant responded with a request for reconsideration after Final Refusal. On February 26, 2015, the examining attorney denied the request for reconsideration.

ISSUES ON APPEAL

Whether the proposed mark has been properly refused because MAGNESITA is generic for the goods in International Class 19 in the application under Trademark Act Section 2(e)(1), 15 U.S.C. §1052(e)(1).

ARGUMENTS

Proposed Mark is Generic for the Goods

Generic terms require refusal because they are common names that the relevant purchasing public understands primarily as describing the genus of the applicant's goods or services. *In re Dial-A-Mattress*

Operating Corp., 240 F.3d 1341, 1344, 57 USPQ 2d 1807, 1810 (Fed. Cir. 2001); *H. Marvin Ginn Corp v. Int'l Ass'n of Fire Chiefs, Inc.,* 782 F.2d 987, 989-90, 228 USPQ 528, 530 (Fed. Cir. 1986)

Respectfully submitted,

/Dawn Feldman Lehker/

Trademark Examining Attorney

Law Office 111

U.S. Patent and Trademark Office

(571)272-9381

dawn.feldman-lehker@uspto.gov

Robert L. Lorenzo

Managing Attorney

Law Office 111

From: Feldman-Lehker, Dawn

Sent: 6/1/2015 9:18:11 AM

To: TTAB EFiling

CC:

Subject: U.S. TRADEMARK APPLICATION NO. 77873477 - MAGNESITA - MAGN6002/TJM - EXAMINER BRIEF

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Attachment Information:

Count: 1

Files: 77873477.doc

UNITED STATES PATENT AND TRADEMARK OFFICE (USPTO)

U.S. APPLICATION SERIAL NO. 77873477

MARK: MAGNESITA

CORRESPONDENT ADDRESS:

THOMAS J MOORE

BACON & THOMAS PLLC

625 SLATERS LN 4TH FLOOR

ALEXANDRIA, VA 22314-1176

GENERAL TRADEMARK INFORMATION:

http://www.uspto.gov/trademarks/index.jsp

TTAB INFORMATION:

http://www.uspto.gov/trademarks/process/appeal/index.jsp

APPLICANT: MAGNESITA REFRACTORIES COMPANY

CORRESPONDENT'S REFERENCE/DOCKET NO:

MAGN6002/TJM

CORRESPONDENT E-MAIL ADDRESS:

mail@baconthomas.com

EXAMINING ATTORNEY'S APPEAL BRIEF

INTRODUCTION

As a preliminary matter the instant appeal brief superseded the incomplete appeal that was erroneously sent on May 14, 2015. The examining attorney requests that the Board disregard the previously submitted incomplete brief. Applicant's Counsel has been advised of the error. The examining attorney apologizes for any confusion this may have caused.

In this case the Applicant appeals the Trademark Examining Attorney's Final Refusal of the proposed mark, MAGNESITA, for "Refractory products not made primarily of metal, namely, refractory bricks, refractory mixes for patching, lining or repairing high temperature apparatus and repairing the lining for furnaces, refractory furnace patching and repair mixes" in International Class 19. Registration has been finally refused because the proposed mark appears to be generic as applied to the proposed refractory products.

The application also includes the following services in International Class 37, "Providing information via a global computer network on constructing, maintaining, and repairing refractory apparatus using refractory products." The examining attorney has stated on the record that the proposed mark is acceptable on the Supplemental Register for the services in International Class 37.

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In response to the original office action, on March 18, 2010, the applicant paid the fee for two classes of services, amended the recitation of services in International Class 35 and provided a translation of the mark. On March 30, 2010 the examining attorney issued an examiner's amendment to put the translation statement in the proper format. Also on March 30, 2010, the examining attorney issued a refusal under Section 2(e)(1) of the Trademark Act because the proposed mark was descriptive of the goods and services based on the translation of the proposed mark.

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On April 29, 2011, the applicant responded to the continuing refusal to register. The response resolved the recitation of services issue but did not resolve the refusal to register under Section 2(e)(1). On May 27, 2010, the examining attorney issued a Final Refusal under Section 2(e)(1).

On June 13, 2011, the applicant filed a response to the Final Refusal as well as an Amendment to Allege Use. In the response, the applicant deleted the services in International Class 35 and requested reconsideration of the refusal stating that the filing of the Amendment to Allege Use for the goods and services in International Classes 19 and 37 raised a new issue.

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On October 4, 2014 the examining attorney issued a Final Refusal of the Section 2(f) claim and maintained the Final Refusal under Section 2(e)(1). On March 14, 2014 the applicant submitted a request for reconsideration of the Final Refusal. On March 27, 2014, the examining attorney denied the applicant's request for reconsideration.

On March 29, 2014, the applicant amended the application to the Supplemental Register. On May 27, 2014, the examining attorney withdrew the Final Refusal because the applicant's response raised a new issue. The examining attorney refused registration on the Supplemental Register in International Class 19 because the proposed mark was generic for the goods. Amendment to the Supplemental Register for the mark for the services in International Class 37 was acceptable.

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ISSUES ON APPEAL

Whether the proposed mark has been properly refused because MAGNESITA is generic for the goods in International Class 19 in the application under Trademark Act Section 2(e)(1), 15 U.S.C. §1052(e)(1).

ARGUMENTS

Proposed Mark is Generic for the Refractory Products

Generic terms require refusal because they are common names that the relevant purchasing public understands primarily as describing the genus of the applicant's goods or services. *In re Dial-A-Mattress Operating Corp.,* 240 F.3d 1341, 1344, 57 USPQ 2d 1807, 1810 (Fed. Cir. 2001); *H. Marvin Ginn Corp v. Int'l Ass'n of Fire Chiefs, Inc.,* 782 F.2d 987, 989-90, 228 USPQ 528, 530 (Fed. Cir. 1986). *See* TMEP §1209.01(c). Generic terms, by definition incapable of indicating source, are the antithesis of trademarks, and can never attain trademark status. *In re Merrill Lynch, Pierce, Fenner, & Smith, Inc.,* 828 F.2d 1567, 1569, 4 USPQ2d 1141, 1142 (Fed.Cir. 1987); *see* TMEP §1209.01(c). Refusal is required because registering generic terms "would grant the owner of [a] mark a monopoly, since a competitor could not describe the goods as they are. *In re Merrill Lynch, Pierce, Fenner, & Smith, Inc.,* 828 F.2d at 1569, 4 USPQ2d at 1142.

Determining whether a mark is generic requires a two-step inquiry:

(1) What is the genus of goods and/or services at issue?

(2) Does the relevant public understand the designation primarily to refer to that genus of goods and/or services?

In re 1800Mattress.com IP, LLC, 586 F.3d 1359, 1363, 92 USPQ2d 1682, 1684 (Fed. Cir. 2009) (quoting *H. Marvin Ginn Corp. v. Int'l Ass'n of Fire Chiefs, Inc.*, 782 F.2d 987, 989-90, 228 USPQ 528, 530 (Fed. Cir. 1986)); TMEP §1209.01(c)(i).

Regarding the first part of the inquiry, the genus of the goods and/or services is often defined by an applicant's identification of goods and/or services. *See In re Country Music Ass'n*, 100 USPQ2d 1824, 1827-28 (TTAB 2011) (citing *Magic Wand Inc. v. RDB Inc.*, 940 F.2d 638, 640, 19 USPQ2d 1551, 1552 (Fed. Cir. 1991)).

In this case, the identification, and thus the genus, is "Refractory products not made primarily of metal, namely, refractory bricks, refractory mixes for patching, lining or repairing high temperature apparatus and repairing the lining for furnaces, refractory furnace patching and repair mixes".

Regarding the second part of the inquiry, the relevant public is the purchasing or consuming public for the identified goods and/or services. *Frito-Lay N. Am., Inc. v. Princeton Vanguard, LLC*, 109 USPQ2d 1949, 1952 (TTAB 2014) (citing *Magic Wand Inc. v. RDB Inc.*, 940 F.2d at 640, 19 USPQ2d at 1553). In this case, the relevant public is large industrial operations that require large scale refractory apparatus.

Determining whether an applied-for mark is generic turns on if "the relevant public primarily uses or understands the mark to refer to the category or [genus] of goods [and/or services] in question." In re Nordic Naturals, Inc., 755 F.3d 1340, 1342, 111 USPQ2d 1495, 1497 (Fed. Cir. 2014); see H. Marvin Ginn Corp. v. Int'l Ass'n of Fire Chiefs, Inc., 782 F.2d 987, 989-90, 228 USPQ 528, 530 (Fed. Cir. 1986); TMEP §1209.01(c). In such a determination, the "relevant public" represents the purchasing or consuming public for the identified goods and/or services. Frito-Lay N. Am., Inc. v. Princeton Vanguard, LLC, 109 USPQ2d 1949, 1952 (TTAB 2014) (citing Magic Wand Inc. v. RDB Inc., 940 F.2d 638, 640, 19 USPQ2d 1551, 1553 (Fed. Cir. 1991)).

The applicant argues that the relevant public are all general consumers because refractory products are sold at stores open to the general public such as Lowe's®, Home Depot®, and Wal Mart®. The examining attorney categorizes the relevant public as large industrial consumers, such as steel mills, that utilize refractory products as a part of their business. The applicant's specimens demonstrate that the applicant provides "refractory solutions," "service solutions," "minerals," "technical support department," and "research and development center." In addition, the applicant submitted another page from its website that maintains that, "Magnesita is the most integrated refractory industry in the world. Over 70% of the raw material used in production is taken from its own mines." (Applicant's response, February 22, 2013, page 2). The applicant also submitted an article discussing the applicant's acquisition of a German refractory product manufacturer. The article's subtitle is "Brazil's leading magnesite producer acquires German dolomite and refractories group, gaining a global customer base and raw material supply." (Applicant's response, March 14, 2014, page 4) The article also discusses the fact that in Brazil, the applicant controls 70% of the steel refractories market and 80% of the cement refractories market and that the applicant is attempting to expand its customer base by acquiring the German company. All of this evidence points to the fact that the applicant caters to large scale industrial operations as its customers and not to the general public.

Key Component of Goods

As discussed above the applicant's goods are "refractory bricks, refractory mixes for patching, lining or repairing high temperature apparatus and repairing the lining for furnaces, refractory furnace patching and repair mixes." The applicant stated in the response to the first office action that the proposed mark MAGNESITA is “magnesia” from Italian and “magnesite” from Spanish and Portuguese.

The name of an ingredient, a key aspect, a central focus or feature, or a main characteristic of goods and/or services may be generic for those goods and/or services. *See In re Tires, Tires, Tires, Inc.*, 94 USPQ2d 1153, 1157 (TTAB 2009) (holding TIRES TIRES TIRES generic for retail tire store services); *In re Cent. Sprinkler Co.*, 49 USPQ2d 1194, 1199 (TTAB 1998) (holding ATTIC generic for automatic sprinklers for fire protection used primarily in attics); TMEP §§1209.01© *et seq.*; *see also In re Northland Aluminum Prods. Inc.*, 777 F.2d 1556, 1559-60, 227 USPQ 961, 963-64 (Fed. Cir. 1985) (holding BUNDT generic for cake mix); *In re A La Vieille Russie, Inc.*, 60 USPQ2d 1895, 1900 (TTAB 2001) (holding RUSSIANART generic for art dealership services); *A.J. Canfield Co. v. Honickman*, 808 F.2d 291, 292, 1 USPQ2d 1364, 1365 (3d Cir. 1986) (holding CHOCOLATE FUDGE generic for diet sodas). Thus, a term does not need to be the name of a specific product and/or service to be found generic.

In this case, magnesia or magnesite is a key ingredient in refractory products. In the office action sent on March 30, 2010, the examining attorney attaches excerpts from a variety of websites that discuss the uses of magnesite. For example, the website *geology.com* lists “Magnesite-Mineral Properties and Uses” which are refractory bricks, cement. (page 2) Also attached to the same March 30, 2010 office action is a website entitled *Minerals Zone World Mineral Exchange,* which shows that magnesite in various forms are used for basic refractories. (pages 6 and 7). Finally, in the same office action the website from *Peter W. Harben , Inc. Industrial Mineral Consultants* demonstrates that magnesite and magnesia are used in refractories.

The office action sent on November 5, 2010 contains more evidence that magnesite is a primary component in refractory products. The first attachment to this office action was from the website *Dictionary.com,* which states in the definition for magnesite that it is used in the manufacture of refractory bricks, a good specifically listed in the applicant's identification of goods. (page 2). In the office action sent on May 27, 2011, the examining attorney attached the abstract of several articles that discuss the uses of magnesite in the refractory industry. (page 4)

The attachments to the office action sent on March 27, 2014 include *Hawley's Condensed Chemical Dictionary, 14th ed., 2011*, that show in an entry for magnesite that its uses are for refractories. (page 2) In another attachment to the same office action from the *Materials Handbook, 14th ed.,* states that magnesite is used in the manufacture of bricks for basic refractory furnace linings. (page 11)

Finally, the examining attorney returns to the applicant's website attached to the February 22, 2013 response that states "Over 70% of the raw material used in production is taken from its own mines." The examining attorney also points to the article attached to the response of March 14, 2014, that refers to the applicant as the "Leading Brazilian magnesite producer." The examining attorney has demonstrated that magnesite is a key component in refractory bricks and other refractory products. The applicant is a leading magnesite producer. It is reasonable to conclude that magnesite is a primary component in the applicant's refractory products.

Translation of Foreign Wording

Under the doctrine of foreign equivalents, a mark that consists of or comprises a word or words from a modern foreign language will be translated into English to determine genericness. *Palm Bay Imps., Inc. v. Veuve Clicquot Ponsardin Maison Fondee en 1772*, 396 F.3d 1369, 1377, 73 USPQ2d 1689, 1696 (Fed. Cir. 2005); *see In re Sambado & Son Inc.*, 45 USPQ2d 1312, 1315 (TTAB 1997); TMEP §1209.03(g).

The doctrine is applied when it is likely that an ordinary American purchaser would "stop and translate" the foreign term into its English equivalent. *Palm Bay Imps., Inc. v. Veuve Clicquot Ponsardin Maison Fondee en 1772*, 396 F.3d at 1377, 73 USPQ2d at 1696 (quoting *In re Pan Tex Hotel Corp.*, 190 USPQ 109, 110 (TTAB 1976)); *cf.* TMEP §1207.01(b)(vi)(A). The ordinary American purchaser refers to "all American purchasers, including those proficient in a non-English language who would ordinarily be expected to translate words into English." *In re Spirits Int'l, N.V.*, 563 F.3d 1347, 1352, 90 USPQ2d 1489, 1492 (Fed. Cir. 2009); *see In re Thomas*, 79 USPQ2d 1021, 1024 (TTAB 2006) (citing J. Thomas McCarthy, *McCarthy on Trademarks & Unfair Competition* §23:36 (4th ed., rev. 2006), which states "[t]he test is whether, to those American buyers familiar with the [modern] foreign language, the word would denote its English equivalent.").

Generally, the doctrine is applied when the English translation is a literal and exact translation of the foreign wording. *See In re Oriental Daily News, Inc.*, 230 USPQ 637, 638 (TTAB 1986); *In re Zazzara*, 156 USPQ 348, 348 (TTAB 1967); TMEP §1209.03(g).

In this instance the applicant responded to the examining attorney's first office action on March 18, 2010 with the translation of MAGNESITA as magnesite or magnesia. The applicant spent a lot of time and effort to demonstrate in its response of December 17, 2014 that the word MAGNESITA does not appear in any English language dictionaries and cannot be found in any of the websites of manufacturers of refractory products. The examining attorney submits that the fact that the word MAGNESITA is not found on the English language websites or in English language dictionaries is irrelevant.

The applicant states that MAGNESITA translates to magnesite from Spanish and Portuguese. Common, modern languages include Spanish, French, Italian, German, Chinese, Japanese, Russian, Polish, Hungarian, Serbian and Yiddish. *See, e.g.*, *Weiss Noodle Co. v. Golden Cracknel & Specialty Co.*, 290 F.2d 845, 129 USPQ 411 (C.C.P.A. 1961) (Hungarian); *In re Tokutake Indus. Co.*, 87 USPQ2d 1697 (TTAB 2008) (Japanese); *In re Joint-Stock Co. "Baik,"* 80 USPQ2d 1305 (TTAB 2006) (Russian); *In re Perez*, 21 USPQ2d 1075 (TTAB 1991) (Spanish); *In re Oriental Daily News, Ltd.*, 230 USPQ 637 (TTAB 1986) (Chinese); *In re Ithaca Indus., Inc.*, 230 USPQ 702 (TTAB 1986) (Italian); *In re Jos. Schlitz Brewing Co.*, 223 USPQ 45 (TTAB 1983) (German); *In re Westbrae Natural Foods, Inc.*, 211 USPQ 642 (TTAB 1981) (Japanese); *In re Optica Int'l*, 196 USPQ 775 (TTAB 1977) (French); *In re Bagel Nosh, Inc.*, 193 USPQ 316 (TTAB 1976) (Yiddish); *In re Hag Aktiengesellschaft*, 155 USPQ 598 (TTAB 1967) (Serbian); *In re New Yorker Cheese Co.*, 130 USPQ 120 (TTAB 1961) (Polish).

In this instance the examining attorney also suggests that some of the people who work for the applicant's customers or in the industry here in the United States more than likely speak Spanish. In the office action dated, November 5, 2010, the examining attorney attached several articles discussing the rise in Spanish in the United States. Spanish is the second most common language spoken in the United States.

The applicant's mark, MAGNESITA, translates to magnesite or magnesia, which is a primary ingredient in the applicant's "refractory products" in International Class 19. Accordingly, the term is considered generic for the goods.

CONCLUSION

The applicant conceded that the term MAGNESITA is translated as magnesia or magnesite. It is undisputed that magnesite is a primary component of refractory products which are the applicant's goods. As such the proposed mark is generic for the applicant's goods in International Class 19. The examining attorney respectfully requests that the Board affirm the refusal to register on the Supplemental Register under Section 23 of the Trademark Act because the proposed mark is generic for the refractory products in International Class 19.

Respectfully submitted,

/Dawn Feldman Lehker/

Trademark Examining Attorney

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Robert L. Lorenzo

Managing Attorney

Law Office 111

To:	Magnesita Refractories Company (mail@baconthomas.com)
Subject:	U.S. TRADEMARK APPLICATION NO. 85834316 - MAGNESITA - MAGN6029/TJM - Request for Reconsideration Denied - Return to TTAB
Sent:	7/13/2015 12:07:40 PM
Sent As:	ECOM111@USPTO.GOV
Attachments:	Attachment - 1 Attachment - 2 Attachment - 3 Attachment - 4 Attachment - 5 Attachment - 6 Attachment - 7 Attachment - 8 Attachment - 9 Attachment - 10 Attachment - 11 Attachment - 12 Attachment - 13 Attachment - 14 Attachment - 15 Attachment - 16 Attachment - 17 Attachment - 18 Attachment - 19 Attachment - 20 Attachment - 21 Attachment - 22 Attachment - 23 Attachment - 24 Attachment - 25 Attachment - 26 Attachment - 27 Attachment - 28

UNITED STATES PATENT AND TRADEMARK OFFICE (USPTO)

OFFICE ACTION (OFFICIAL LETTER) ABOUT APPLICANT'S TRADEMARK APPLICATION

U.S. APPLICATION SERIAL NO. 85834316

MARK: MAGNESITA

85834316

CORRESPONDENT ADDRESS:
THOMAS J. MOORE
BACON & THOMAS, PLLC
625 SLATERS LN FL 4
ALEXANDRIA, VA 22314-1169

GENERAL TRADEMARK INFORMATION:
http://www.uspto.gov/trademarks/index.jsp

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APPLICANT: Magnesita Refractories Company

CORRESPONDENT'S REFERENCE/DOCKET NO :
MAGN6029/TJM
CORRESPONDENT E-MAIL ADDRESS:
mail@baconthomas.com

REQUEST FOR RECONSIDERATION DENIED

ISSUE/MAILING DATE: 7/13/2015

The trademark examining attorney has carefully reviewed applicant's request for reconsideration and is denying the request for the reasons stated below. *See* 37 C.F.R. §2.63(b)(3); TMEP §§715.03(a)(ii)(B), 715.04(a). The following requirement(s) and/or refusal(s) made final in the Office action dated November 10, 2015 are maintained and continue to be final: descriptiveness refusal under Section 2(e)(1) and the final refusal of the claim of acquired distinctiveness under Section 2(f). *See* TMEP §§715.03(a)(ii)(B), 715.04(a).

In the present case, applicant's request has not resolved all the outstanding issue(s), nor does it raise a new issue or provide any new or compelling evidence with regard to the outstanding issue(s) in the final Office action. In addition, applicant's analysis and arguments are not persuasive nor do they shed new light on the issues. Accordingly, the request is denied.

If applicant has already filed a timely notice of appeal with the Trademark Trial and Appeal Board, the Board will be notified to resume the appeal. *See* TMEP §715.04(a).

If no appeal has been filed and time remains in the six-month response period to the final Office action, applicant has the remainder of the response period to (1) comply with and/or overcome any outstanding final requirement(s) and/or refusal(s), and/or (2) file a notice of appeal to the Board. TMEP §715.03(a)(ii)(B); *see* 37 C.F.R. §2.63(b)(1)-(3). The filing of a request for reconsideration does not stay or extend the time for filing an appeal. 37 C.F.R. §2.63(b)(3); *see* TMEP §§715.03, 715.03(a)(ii)(B), (c).

Request for Reconsideration Denied-Section 2(f) Claim Fails

The examining attorney issued a FINAL refusal of the mark under Section 2(f) because the proposed mark, MAGNESITA, is generic as used by the applicant. The applicant submitted sales figures for four years of use in the United States along with an article written about the applicant acquiring domestic refractory products company. Applicant has asserted acquired distinctiveness based on the evidence of record; however, such evidence is not sufficient to show acquired distinctiveness because, as demonstrated by the attached and previously attached evidence, applicant's mark is of a highly descriptive, if not generic, nature. *See* 15 U.S.C. §1052(e)(1), (f); *In re MetPath, Inc.*, 1 USPQ2d 1750, 1751-52 (TTAB 1986); TMEP §1212.04(a). Additional evidence is needed.

When asserting a Trademark Act Section 2(f) claim, the burden of proving that a mark has acquired distinctiveness is on the applicant. *Yamaha Int'l Corp. v. Yoshino Gakki Co.*, 840 F.2d 1572, 1578-79, 6 USPQ2d 1001, 1004 (Fed. Cir. 1988); *In re Meyer & Wenthe, Inc.*, 267 F.2d 945, 948, 122 USPQ 372, 375 (C.C.P.A. 1959); TMEP §1212.01. Thus, applicant must establish that the purchasing public has come to view the proposed mark as an indicator of origin.
The applicant's goods and services are "refractory products not primarily of metal, namely, refractory bricks, refractory mixes for patching, lining or repairing high temperature apparatus and repairing the lining for furnaces, refractory furnace patching and repair mixes; and pre-cast refractory shapes" and "providing information via a global computer network on the use of refractory products to construct, maintain and repair refractory apparatus using refractory products; and providing information via a global computer network on the use of mechanical equipment and computer models to construct, maintain and repair refractory installations."
As has been discussed in prior office actions, the term MAGNESITA translates to magnesia or magnesite. Magnesia and magnesite are components of refractory products. The applicant's goods are refractory products. The generic name of an ingredient of the goods is incapable of identifying and distinguishing their source and is thus unregistrable on either the Principal or Supplemental Register. *See In re Hask Toiletries, Inc.*, 223 USPQ 1254, 1255 (TTAB 1984) (holding HENNA 'N' PLACENTA incapable of registration on the Supplemental Register for hair conditioner); *In re Pepcom Indus., Inc.*, 192 USPQ 400, 402 (TTAB 1976) (holding JIN.SENG incapable for soft drinks); TMEP §1209.01(c).

Moreover, under the doctrine of foreign equivalents, a mark that consists of or comprises a word or words from a modern foreign language will be translated into English to determine genericness. *Palm Bay Imps., Inc. v. Veuve Clicquot Ponsardin Maison Fondee en 1772*, 396 F.3d 1369, 1377, 73 USPQ2d 1689, 1696 (Fed. Cir. 2005); *see In re Sambado & Son Inc.*, 45 USPQ2d 1312, 1315 (TTAB 1997); TMEP §1209.03(g).

The doctrine is applied when it is likely that an ordinary American purchaser would "stop and translate" the foreign term into its English equivalent. *Palm Bay Imps., Inc. v. Veuve Clicquot Ponsardin Maison Fondee en 1772*, 396 F.3d at 1377, 73 USPQ2d at 1696 (quoting *In re Pan Tex Hotel Corp.*, 190 USPQ 109, 110 (TTAB 1976)); *cf.* TMEP §1207.01(b)(vi)(A). The ordinary American purchaser refers to "all American purchasers, including those proficient in a non-English language who would ordinarily be expected to translate words into English."

In re Spirits Int'l, N.V. , 563 F.3d 1347, 1352, 90 USPQ2d 1489, 1492 (Fed. Cir. 2009); *see In re Thomas*, 79 USPQ2d 1021, 1024 (TTAB 2006) (citing J. Thomas McCarthy, *McCarthy on Trademarks & Unfair Competition* §23:36 (4th ed., rev. 2006), which states "[t]he test is whether, to those American buyers familiar with the [modern] foreign language, the word would denote its English equivalent.").

Generally, the doctrine is applied when the English translation is a literal and exact translation of the foreign wording. *See In re Oriental Daily News, Inc.*, 230 USPQ 637, 638 (TTAB 1986); *In re Zazzara*, 156 USPQ 348, 348 (TTAB 1967); TMEP §1209.03(g).

The applicant's attorney conducted a search of over 25 websites for refractory goods using MAGNESITA as the search term which resulted in no hits on any of the websites. However, the examining attorney conducted a search of magnesite or magnesia which is the translation of MAGNESITA.

First, the examining attorney directs the applicant's attention to the first attachment to this office action ISPAT GURU. Magnesia, Magnesite and Magnesium Oxide are used interchangeably.

> The word magnesite literally refers only to the natural mineral, but common usage applies this name to three other types of materials, dead burned magnesia (DBM), electro fused magnesia and calcined magnesia also called caustic calcined magnesia. Often magnesia word is replaced by magnesite in these products. These products of magnesite often differ mainly in density and crystal development that results from different levels of heat application.

The examining attorney conducted a search of the websites the applicant mentions in its response. For example, the Zicoa.com website may not have " magnesita" listed as an input in its refractory products. However, the website does state that magnesia is a component in its Zicoa backup products. On the website Firebrickengineers.com, " magnesita" is not mentioned but magnesia is mentioned as a component of its Ladlemax products. The Mineraltec.com website does not list " magnesita" as a component of any of the goods but MgO the chemical symbol for magnesium oxide is listed as a component of the applicant's goods.

The examining attorney looked at all the websites and many did not actually produce refractory products. For example, the website for the Edward Orton Jr. Ceramic Foundation states that it provides products for "thermal process verification, thermo-analytical instruments and materials testing services." The applicant is related to the refractory products industry but does not actually produce refractory bricks or other refractory products.

Elgin Butler produces ceramic glazed masonry products such as ceramic tiles. The goods are not for lining the inside of kilns and other high temperature operations but are for construction applications.

Miami Stone Installers are a construction company that installs granite countertops, builds brick and stone walls and builds fireplaces. This company does not produce refractory products.

Finally, the applicant included three large retailers that sell one or two refractory items, Lowe's, Home Depot and Wal-Mart. None of these companies are in the business of producing refractory products.

For the above reasons, the applicant's request for reconsideration is denied and the FINAL refusal under Section 2(e)(1) and the FINAL refusal of Section 2(f) is maintained and continued.

/Dawn Feldman Lehker/
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Magnesia Ceramic – Luminex™ 970

Product Details
in: Industrial Ceramic Materials

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Product Overview

Morgan Advanced Materials

Morgan Advanced Materials
25 Madison Road
Fairfield, NJ 07004
USA

Phone: (800)423-0638
Fax: (973)227-7135

Business Type: Manufacturer, Service

No Image Provided

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A high-purity porous magnesia ceramic of typical composition 99.0% MgO and 0.65% CaO. Other components are 0.23% Al_2O_3 and 0.12% SiO_2, with less than 0.05% Fe_2O_3 and less than 0.001% B+Cd.

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High Surface Area Rings and Extrudates - HAS Alumina Rings
Saint-Gobain Innovative Materials

High Surface Area (HSA) Catalyst Carrier - SS Series Silica

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- SS Series Silica
Saint-Gobain NorPro

See All Suppliers

Specifications

Product Category	Industrial Ceramic Materials
Material Type	MgO / Magnesite
Thermal & Physical Properties	
Max Use Temperature	1200 C (2192 F)
Thermal Conductivity	8 to 32 W/m-K (4.62 to 18.49 BTU-ft/hr-ft²-F)
Density	2.20E-9 to 2.70E-9 g/cc (1.84E-8 to 2.25E-8 lbs/gal)
Mechanical Properties	
MOR / Flexu[illegible]	
Compressive [illegible]	
Performance Fea[illegible]	

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- CHEMICAL & ACID RESISTANT CEMENT
- FIRE CEMENTS & PUTTIES
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VITSET ready mixed high alumina refractory cements / mortars are suitable for jointing, coating, and patching in all high temperature applications from 1450°C / 2640°F up to 1860°C / 3380°F. They are air-setting, with outstanding bonding properties at ambient and operating temperatures. Recommended bed for jointing firebricks is 3mm.

Vitset 45

Air setting refractory mortar, ready for use for trowelling and patching. Mortar forms a strong air-dried bond with all grades of refractory bricks for use up to service temperatures of 1700°C / 3100°F

Examples of Applications:

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Fire Cement & Castable Refractories in Boilers

Refractories are heat resistant materials that are used to line high temperature furnaces and other high temperature processing units. Refractories have to be resistant to thermal stress and other heat-related phenomena, and they have to stand up to physical wear, abrasion and chemical corrosion. The refractories have to be more heat resistantthan metals, and they are required for heating...

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OUR PRODUCTS

Used for setting dense refractory bricks, high temperature insulation bricks and ceramic fibre blankets, boards,modules etc.

- Foundry ladles
- Foundry furnaces
- Kilns and kiln cars - ceramics
- Rotary cement kilns

Product	Maximum Service Temperature	Bond Type	Chemical Analysis (%)	
			Al_2O_3	Fe_2O_3
Vitset 45	1700°C /3100°F	Air setting	44.7	0.7

Vitset 80

Ready mixed form ready to use suitable for setting bricks and can also be supplied at a thinner consistency for dipping bricks, coating and spraying. This material forms a strong air set bond with all grades of refractory bricks whether used as a joint or a render. The material is slightly expansile at 1540°C ensuring good tight joints with no shrinkage problems at joint lines. It also has very good resistance to slag attack and it is very stable up to 1750°C.

Examples of Applications:

Used in steel works and foundries where high temperatures are encountered such as setting high alumina bricks for safety linings in pouring ladles and setting bricks and purging nozzles in continuous casting tundishes.

Product	Maximum Service Temperature	Bond Type	Chemical Analysis (%)	
			Al_2O_3	Fe_2O_3
Vitset 80	1750°C /3180°F	Air setting	74.0	1.3

Vitset 85

Ready mixed high alumina refractory mortar with maximum service temperature of 1810°C. Suitable for higher temperature alloys and treatment vessels.

Product	Maximum Service Temperature	Bond Type	Chemical Analysis (%)	
			Al_2O_3	Fe_2O_3
Vitset 85	1810°C /3290°F	Air setting	81.0	0.7

OUR PRODUCTS

HEAT RESISTANT TILE ADHESIVE

VITCAS
READY MIXED

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HEAT RESISTANT TILE GROUT
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CONSTRUCTION
HEAT RESISTANT ADHESIVE VITCAS HB 10
HEAT RESISTANT ADHESIVE VITCAS HB 05
RAPID SETTING CEMENTS
HEAT RESISTANT BOARD ADHESIVE
PRE-CAST SHAPES
HEAT RESISTANT RENDER & PLASTER SYSTEM
WOOD FIRED BREAD & PIZZA OVEN
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OVEN
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HEAT ACCUMULATION FIREBOARD SYSTEM
HIGH TEMPERATURE SEALANTS
HEAT RESISTANT SILICONE SEALANT
BLACK FIRE CEMENT
FLUE CEMENT
HEAT RESISTANT FILLER
HEAT RESISTANT SEALANT
HEAT RESISTANT TILE ADHESIVE
HEAT RESISTANT BOARD ADHESIVE 310ML
INTUMESCENT & ACOUSTIC SEALANT
FIREPLACE & STOVE CLEANERS
VERMICULITE BOARD & CEMENT
VERMICULITE FIRE RESISTANT BOARDS
VERMICULITE
VERMICULITE INSULATING CEMENT
THERMAL ROPES, TAPES & ADHESIVE
HEAT RESISTANT PAINTS

Vitset 90

Ready mixed high alumina refractory mortar developed with high purity and high refractoriness coupled with stability at high temperatures for more specialise applications with alumino-silicate and magnesite refractories.

Examples of Applications:

Used in setting sliding gate plates, purging nozzles and setting pre-cast shapes.

Product	Maximum Service Temperature	Bond Type	Chemical Analysis (%)	
			Al_2O_3	Fe_2O_3
Vitset 90	1860°C /3380°F	Air setting	88.0	0.1

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Magnesia

Magnesia or magnesium oxide (MgO) is a white hygroscopic solid mineral that occurs naturally as periclase. It forms magnesium hydroxide in the presence of water ($MgO + H_2O = Mg(OH)_2$), but this reaction can be reversed by heating magnesium hydroxide to separate moisture.

Magnesium (Mg) is the eighth most abundant element and constitutes about 2 percent of the crust of the earth. It is the third most plentiful element dissolved in seawater, with a concentration averaging 0.13 %. Although magnesium is found in over 60 minerals, only dolomite, magnesite, brucite, carnallite, and olivine are of commercial importance. Magnesium and magnesium compounds are produced from seawater, well and lake brines and bitterns, as well as from the above mentioned minerals.

Magnesite ($MgCO_3$), the naturally occurring carbonate of magnesium (Mg) is one of the key natural sources for the production of magnesia (MgO) and subsequently fused magnesia. It is the world's largest source of magnesia. It contains a theoretical maximum magnesia content of 47.6 %. It occurs in two distinct physical forms namely (i) macro-crystalline and (ii) crypto-crystalline. Crypto-crystalline magnesite is generally of a higher purity than macro-crystalline one, but tends to occur in smaller deposits than the macro-crystalline form.

The word magnesite ...

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The word magnesite usually refers only to the natural mineral, but common usage applies this name to three other types of materials, dead burned magnesia (DBM), electro fused magnesia and calcined magnesia also called caustic calcined magnesia. Often magnesia word is replaced by magnesite in these products. These products of magnesite often differ mainly in density and crystal development that results from different levels of heat application. The three products of magnesite are shown in Fig 1.

Dead burned magnesia
Electro fused magnesia
Calcined magnesia

Fig 1 Products of magnesite

Magnesia is an alkaline earth metal oxide. Magnesium oxide is normally produced by the calcinations of naturally occuring minerals mainly magnesite. Other important sources of magnesium oxide are seawater, underground deposits of brine and deep salt beds from which magnesium hydroxide is processed. The general properties of magnesia is given in Tab 1.

Tab 1 Properties of magnesia

Property	Units	Minimum Value	Maximum Value
Atomic Volume (average)	cum/kmol	0.0056	0.0058
Density	g/cc	3.54	3.58
Compressive Strength	MPa	833.3	1666.6
Hardness	MPa	5000	7000
Modulus of Rupture	MPa	100	200
Latent Heat of Fusion	kJ/kg	1870	1880
Maximum Service Temperature	K	2350	2400
Melting Point	K	3080	3135
Specific Heat	J/kg.K	880	1030
Thermal Conductivity	W/m.K	30	60
Thermal Expansion	10^{-6}/K	9	12

Magnesia is a refractory material which is physically and chemically stable at high temperatures. Refractory industry is the largest consumer of magnesia worldwide.

The terms dead burned magnesia (DBM), electro fused magnesia (EFM), or refractory magnesia are used predominantly in the refractory industry where they are mainly used to make shaped and unshaped products to line high temperature vessels such as furnaces and kilns in the steel, cement, non-ferrous, glass and chemical industries. The terms refer to the granular product produced by firing of magnesite, magnesium hydroxide, or another material reducible to magnesia at temperatures which normally exceeds 1500 deg C. The heating process is to be of sufficiently long duration to produce a dense, reasonably weather stable granule for use in manufacturing refractory materials.

Dead burned magnesia (often called dead burnt) is used almost exclusively for refractory applications in the form of basic bricks and granular refractories. Dead burned magnesia has the highest melting point of all common refractory oxides and is the most suitable heat containment material for high temperature processes in the steel industry. Basic magnesia bricks are used in furnaces, ladles and secondary refining vessels. Electro fused magnesia is superior to dead burned magnesia in strength, abrasion resistance and chemical stability.

The terms high grade and high purity generally refer to a refractory magnesia containing more than 98 % MgO, a density greater than 3.30 g/cc, preferably 3.40 g/cc, and a proper relationship of auxiliary oxides.

Magnesia is used in the steel industry as a refractory brick impregnated with tar, pitch, graphite etc to give optimum properties for corrosion resistance in environments of basic slags. Calcined magnesia is used in steel making to modify the properties of steel making slags during

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resistance in environments of basic slags. Calcined magnesia is used in steel making to modify the properties of steel making slags during steel making as well as to change slag characteristics for slag splashing in BOF vessels. The main application of magnesia is in steel refractories with more than 70 % of all type of magnesia refractories used in steel production and continuous casting operations.

High grade DBM and EFM are used mainly in bricks/shapes to produce the following refractories.

- Magnesia carbon bricks
- Magnesia bricks
- Magnesia chrome bricks
- Magnesia spinel bricks
- Magnesia dolomite bricks
- Magnesia carbon alumina bricks

DBM is mostly used in the manufacture of basic monolithic refractories such as gunning repair products, tundish working linings and precast shapes (tundish dams/weirs). Applications for sintered magnesite include isostatic pressed shapes and flow control systems (sliding gate plates etc.)

High grade magnesia for refractory applications is classified according to purity (MgO content), bulk specific gravity (BSG), periclase crystal size (PCS) and CaO/SiO2 ratio. When the grain size of the magnesia crystal is large then its stability is very good. Typically, high grade DBM for the steel industry requires MgO content of 97 % minimum, BSG of 3.40 minimum, PCS of 100 microns minimum and CaO/SiO2 ratio of 2.0 minimum.

The addition of fused magnesia grains can greatly enhance the performance and durability of basic refractories such as mag-carbon bricks. This is a function of a higher bulk specific gravity and large periclase crystal size, plus realignment of accessory silicates. Refractory grade fused magnesia has exacting specifications and is normally characterized by the following.

- Generally high magnesia content (minimum 97 % MgO and up to/exceeding 99 % MgO)
- Low silica which means high lime to silica ratio of 4 minimum
- Densities of 3.50 g/cc or more
- Large periclase crystal sizes (1000 microns minimum)

Due to its relatively high chemical stability, strength and resistance to abrasion as well as excellent corrosion resistance, refractory grade fused magnesia is used in high wear areas in steel making. Lower grade EFM is also used in refractory bricks and shapes. EFM also has high thermal conductivity.

Calcined magnesia is normally graded according to purity, sizing and reactivity. Most of the calcined magnesia produced has MgO content ranging from 85 % to 95 %. It has a loss of ignition (LOI) value of less than 10 % and has a high reactivity which means that it has got high absorbing capacity for water vapour and CO2?

Historically the main global producers of high grade DBM have been based on synthetic technology converting magnesium rich seawater or brine into magnesia. The only natural high grade DBM producers are Turkey and Australia which are based on cryptocrystalline magnesite deposits.

Production process for calcined magnesite, DBM, and EFM

MgO is produced by the calcination of MgCO3 or Mg(OH)2 or by the treatment of magnesium chloride with lime followed by heat. Calcining at different temperatures produces magnesium oxide of with different reactivity. High temperatures (1500 deg C to 2000 deg C) produces dead-burned magnesia, an unreactive form used as a refractory. Calcining temperatures (1000 deg C to 1500 deg C produces hard-burned magnesia which has limited reactivity while lower temperature, (700 deg C to 1000 deg C) calcining produces light-burned magnesia, a reactive form, which is called calcined magnesia.

Magnesite is converted into magnesia by the application of heat which drives off carbon dioxide (CO2), thereby converting the carbonate to the oxide of magnesium (MgO).

Magnesite, from both natural sources (primarily magnesite) and synthetic sources (seawater, natural brines or deep sea salt beds), is converted into calcined magnesia by calcining to between 700 deg C and 1000 deg C, driving off most of the contained CO2. Calcined magnesia is both an end product and an intermediary step in the chain of magnesia products.

Further calcining of magnesite at higher temperatures between 1500 deg to 2000 deg C results in the largely inert product, dead burned magnesia. Heating to this level drives off all but a small fraction of the remaining CO2 to produce a hard crystalline non reactive form of magnesium oxide known as periclase. Dead burned magnesia exhibits exceptional dimensional stability and strength at high temperatures.

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Fused magnesia is produced in a three phase electric arc furnace. Taking high grade magnesite or calcined magnesia as raw materials, 12 hours is required for the fusion process at temperatures in excess of 2750 deg C. The process promotes the growth of very large crystals of periclase (greater than 1000 microns compared 100 microns for dead burned magnesia) with a density approaching the theoretical maximum of 3.58 g/cc.

In fused magnesia production, the main constraints on capacity are the size and number of electric arc furnaces, and the cost of energy. The manufacture of fused magnesia is very power intensive with electricity consumption varying between 3500-4500 kWh/ton.

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Engineered for a Wide Range of Extreme Environments

Refractory Backup & Custom Granular Materials

Refractory backup (also known as thermal insulation and grog) and custom granular Zirconium Oxide materials are available in unstabilized (pure) form or stabilized (combined) with yttrium oxide, magnesium oxide or calcium oxide for structural stability.

While pure zirconia has limited refractory applications, the stabilized granular forms are engineered to withstand breakdown due to extreme thermal shock and thermal cycling.

Stabilization Types and Application Guidelines

- **Magnesia** — Molten metal environments and environments subject to extreme wear
- **Yttria** — Thermal barriers and in ionic conductive applications
- **Calcia** — Continuous high temperature, or cycling applications with no molten metal contact

Zircoa's refractory backup and granular materials are comprised of porous, irregularly shaped particles. The materials are available in a variety of banded or down mesh sizes. Custom milled materials as small as 0.5 microns are also available.

Zircoa's granular materials possess excellent insulating properties. They have approximately five times the insulating value of alumina or magnesia. As an example: when used as a crucible backup (also known as grog) Zircoa granular materials will extend crucible life and result in cleaner melts.

REFRACTORY BACKUP (THERMAL INSULATION)

Extend the life of your furnace, and maintain tighter control over your furnace temperatures with Zircoa's pre-sintered grog refractory backup.

Refractory Backup Types & Sizes

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Refractory Backup Types & Sizes

1. **Zircoa Backup 1859** – Partially stabilized with magnesia and calcia. Available in -8+100 Tyler mesh size.
2. **Zircoa Backup 3001** – Partially stabilized with magnesia. Available in -8+28 Tyler mesh size.
3. **Zircoa Backup 108** – Calcia stabilized bubble zirconia. Available in -10+30 Tyler mesh size.

SPECIFICATIONS

Typical Properties

	Yttria Stabilized Products	Magnesia Stabilized Products	Dual Stabilized Products	Monoclinic Products
SiO_2	0.5	08. - 1.5	2.0	0.2 - 1.25
CaO	0.2	0.45	4.50 Total CaO + MgO	0.20 - 0.75
MgO	0.05	1.70 - 3.50		0.1 - 0.35
Fe_2O_3	0.2	0.2	0.20	0.20
Al_2O_3	0.1	0.3	0.25	0.30
TiO_2	0.1	0.2	0.20	0.25
Y_2O_3	7.0 - 9.0	---	---	---

Typical Screen Analyses

	Mesh Size (Tyler)	% (max or range)
-3+6	+3	10
	-3 +3.5	10-40
	-3.5 +4	20-50
	-4 +6	10-40
	-6 +8	5-35
	8	20
-6 Mesh	+6	10
	-6 +8	10-40
	-8 +14	20-50
	-14 +28	10-40
	-28 +48	5-35
	-48 +100	0-25

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	-100	30
-8 Mesh	+8	1
	-8 +14	32
	-14 +28	13-45
	-28 +48	20-45
	-48 +100	43
	-325	11
-14 Mesh	+14	0
	-14 +28	10-40
	-28 +48	15-25
	-48 +100	15-30
	-100 +325	20-40
	-325	0-10
-28 Mesh	+8	0
	+14	0
	-14 +28	0-9
	-28 +48	27-72
	-48 +100	18-36
	-100 +325	4-35
	-325	0-10
-100 Mesh	+48	1
	-48 +100	5
	-325	25
-325 Mesh	+200	5
(Wet Screen)	+325	15

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LO-SIL SUPER

ALUMINA BRICK

ALUMEX

KRIAL

KRIMUL

DURALITE

DURATAB

KRICOR

KRITAB

SENECA

LADLEMAX

ALUMINA BRICK

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This is a general guide to the alumina brick products available from RESCO Products. These

bricks are manufactured with the highest quality materials at ISO-certified plants, using modern

SPC procedures. The brick are formulated and shaped to meet the high temperature and corrosive

conditions present in the production of industrial goods-from aggregate materials and primary

metals to complex hydrocarbon chemicals used throughout the world.

EXTRA HIGH ALUMINA BRICK

KRICOR ·RESCAL 90 XD

These unique 90+% alumina brick are made from tabular alumina with a mullite matrix. They are

characterized by high resistance to slag attack, low porosity and permeability, high hot strength and density, resistance to severe abrasion and excellent dimensional stability. These mullite bonded 90% alumina refractories are used in the working linings of coreless and channel induction furnaces.

Other applications include: Carbon black reactors · Ceramic kiln linings · High temperature chemical and waste incinerators · Induction furnace linings, skid rails, and SRU linings.

DURA-TAB CA

DURA-TAB CA is a burned, phosphate-bonded 90% alumina-chrome brick. Compared to mullitebonded 90% alumina brick, it offers exceptional service against highly aggressive furnace slag.

DURA-TAB SC

DURATAB SC is a unique product that combines silicon carbide with high purity alumina to produce a refractory possessing exceptional resistance to very aggressive furnace slag associated with induction furnaces processing molten iron, and which is quite resistant to thermal shock. DURATAB SC is recommended for use in the slag lines of iron melting furnaces.

KRITAB ·RESCAL 10 CR ·RESCAL 10 CR SR

All of these brick are alumina-chrome-solid solution-bonded 90% alumina brick. These brick are truly solid solution-bonded brick; the matrix consists of a solid solution of chromic oxide and alumina which results in extra hot load resistance and ability to withstand high temperature chemical attacks. The silica-free bonding system and neutral chemistry offer excellent resistance to erosion/corrosion from iron oxide-silica rich slags. They can be used in severe corrosion areas of channel type induction furnaces and any other applications where load-bearing and corrosion resistance are critical factors. They are recommended for the slag line of arc holding furnaces, carbon black reactors and incinerators. The 10 CR SR is the spall resistant product of the alumina-chrome family.

DURA-TAB

DURATAB is a 95% alumina mullite-bonded brick.

HIGH ALUMINA BRICK FOR ALUMINUM CONTACT

LO-SIL SUPER

Among the many refractories developed for aluminum melting furnaces, this 90% alumina brick with non-wetting additive stands out for its exceptional resistance to attack by molten aluminum.

LO-SIL SUPER is ideal in furnace linings for the production of hard alloys. LO-SIL SUPER brick minimize silicon pick-up and furnace downtime; they preserve the quality of the molten alloy.

Their hardness and high modulus of rupture give the brick lining excellent resistance to impact and abrasion.

FURNAL HS and RESCAL 80 BP (Burned)

These two product are ideal choices for molten aluminum contact in melting and holding furnaces. They perform well in aluminum furnaces with high mechanical wear and abuse. Both are bauxite-based, burned 85% alumina brick with superior hot and cold strengths. Their non-wetting matrix and high strengths make either an ideal choice for melting or holding furnaces, especially those utilizing heavy cold charges.

FURNAL and RESCAL 80 PA (Baked)

FURNAL and RESCAL 80 PA are 85% alumina, phosphate containing baked brick, each with a unique non-wetting matrix, which minimizes silicon pickup and facilitates fast and easy furnace cleaning. They are strong and can withstand the severe mechanical abrasive conditions encountered in today's aluminum furnaces. Dimensional stability and exacting manufacturing tolerances assure fast, long lasting installations. Both products recommended for metal contact with a broad range of aluminum alloys.

MARELAN PLANT

High Alumina Brick-Alkali and Creep Resistant

The alkali and creep resistant KRIAL brick are high purity, low alkali products based on high purity aluminas, calcined bauxitic kaolins, and high grade andalusite. Designed originally for use in blast furnaces and blast furnace stoves due to their low creep rate and carbon monoxide resistance, several of these products have also flourished in other markets including glass furnace regenerators and carbon anode baking furnaces. All of the brands listed on this page give an "A" rating in the ASTM carbon monoxide (CO) disintegration test.

KRIAL 50-A

KRIAL 50-A has a combination of creep resistance, dimensional stability, resistance to chemical attack and thermal conductivity which make it ideally suited for heat exchange applications. Its high purity micro structure with a low glass content and a high amount of mullite is extremely creep and spall resistant. It can withstand higher operating temperatures than typical low flux super duty brick. It is an ideal product for use in high-efficiency, thin-wall blast furnace stove checkers . It is also an excellent choice for

all areas of carbon anode baking furnaces where its refractoriness and superior mechanical properties are essential. Its matrix mineralogy is very resistant to the destructive silica depletion caused by fluorine attack. KRIAL 50-A offers the baking pit operator the opportunity to improve productivity by significantly raising firing temperatures and reducing cycle times.

KRIAL 60

KRIAL 60 is a low alkali, low porosity brick with outstanding hot strength. Its superior resistance to thermal shock, abrasion and alkali attack help make it the cost effective solution for a variety of severe applications. KRIAL ® 60 has seen cost effective solution for a variety of severe applications. KRIAL® 60 has seen extensive service in blast furnace stack linings and is highly recommended for use in torpedo ladles, chemical and waste incinerators and as tie brick in carbon anode baking furnaces.

KRIAL 60-A +

KRIAL 60-A+ is the primary answer for blast furnace and blast furnace stove applications requiring a low flux 60% alumina product. KRIAL 60-A+ is a low porosity, high strength product and has become the choice for most thin wall stove checker applications. It has been quite successful in blast furnace stack linings and torpedo ladles.

KRIAL 65-A

KRIAL 65-A is recommended for use in the highest temperature areas of blast furnace stoves. It is extremelycreep resistant at 2730°F and is primarily utilized in the uppermost checkers and dome of the stove. KRIAL 65-A is andalusite-based and provides all the benefits of high fired mullite products. It's matrix has an exceptionally low glass content.

KRIMUL

KRIMUL is an ultrahigh purity, low flux brick that provides the maximum resistance to hot load deformation and creep in the 60% alumina product range. This andalusite-based brick satisfies all ASTM requirements for classification as a mullite refractory. Its outstanding load bearing properties at 2550°Fqualify it for severe blast furnace stove and hot blast main applications. Also, its resistance to low basicityslag make it a natural choice for torpedo ladles. KRIMUL has good abrasion and thermal shock resistance and has performed well in glass furnace regenerators due to its excellent resistance to alkali attack.

RESIN-BONDED ALUMINA-CARBON

BRICK

LadleMax 80 R5

LadleMax 80 R5 is a resin-bonded alumina-carbon brick. The brick is a metal-free, 80% alumina class product with 5% carbon content. This product is used to line the low wear areas of iron and steel ladle bottomsand sidewalls.

LadleMax BSC

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LadleMax BSC is a resin-bonded alumina-carbon brick with silicon carbide brick designed for hot metal carand iron charging ladle service. This bauxite-based, iron-friendly refractory is typically used in low wear areas of the vessel sidewalls and bottoms.

LadleMax ASC

LadleMax ASC is a resin-bonded alumina-carbon brick with silicon carbide that also contains fused alumina. This product is used in the iron charging ladles and hot metal cars such as tap stream impact pads or stir quadrants.

LadleMax AMG

LadleMax AMG is an 80% alumina brick containing magnesia, antioxidants, and graphite. At steelmaking temperatures the mix ingredients react to form various carbon and magnesia-spinel phases. These reactions are expansive and provide a brick lining whcich appears monolithic. This product is recommended for ladle bottoms and barrels of steel shops making aluminum-killed steels.

LadleMax AMG SL

LadleMax AMG SL is similar to AMG, but contains a higher quantity of magnesia for improved slag resistance.

LadleMax AMG HP

LadleMax AMG HP is an 80% alumina brick containing a blend of refractory grade alumina plus magnesia, antioxidants, and graphite. At steelmaking temperatures, these mix ingredients react to form various carbon and magnesia-alumina spinel phases. AMG HP is suggested for steel ladle bottoms and barrels when a 10% to 25% life improvement is needed over regular AMG. This product has a higher purity composition than LADLEMAX AMG (higher alumina and less silica, lime, and iron oxide).

LadleMax AMG 90

LadleMax AMG 90 is similar to regular AMG, but it contains fused alumina, the alumina content is 90%. It was developed for severe operating conditions associated with tap stream impact and buffer zones between lower quality ladle barrel brick and Magnesia-Carbon slaglines. LADLEMAX AMG 90 is typically zoned with other AMG compositions to provide a balanced wear pattern to achieve maximum heat life.

LadleMax AMG 90 SL

LadleMax AMG 90 SL is similar to AMG 90, but contains a higher quantity of magnesia for improved slag resistance.

LadleMax AMG 95

LadleMax AMG 95 is similar to AMG 90 with improved chemistry. Product has shown wear rate improvement of 20-25% above AMG 90.

GENERAL PURPOSE ALUMINA BRICK

RESCAL BB

This product is a low duty fireclay backup brick for cryolite cells. This is a resale product.

KRIAL 50

This is a general purpose 50% alumina brick.

NARCAL 60

This general purpose 60% alumina brick is an excellent choice as an upgrade to super duty brick. This brick is not recommended for CO atmospheres, high temperatures, alkali environments, or load-bearing applications.

KRIAL 70 HS ·ALUMEX 70-HS ·ALUMEX 70-E ·SENECA ·NARCAL

70 D · RESCAL B 70L · DURALITE 70

These general purpose, bauxite-based 70% alumina brick feature an extraordinary degree of corrosion and thermal shock resistance. They are ideally suited where cost effectiveness is essential. These brick are used to line iron and steel ladles, EAF furnaces, mineral processing units, and non-ferrous furnaces. These general purpose brick are NOT recommended for CO atmospheres, high temperature alkali environments, or load bearing applications.

DURALITE 70 G

DURALITE 70 G is a bauxite based brick made with higher purity and more refractory raw materials than general purpose 70% alumina brick. It can be used in all applications where general purpose 70% alumina brick would normally be recommended, but operating conditions require an upgrade.

RESCAL B 75L · SENECA 80 · RESCAL 80 · RESCAL B 80L ·

KRIAL 80 HS · DURALITE 80

These general purpose 80% alumina, bauxite-based brick are used as economical upgrades over the general purpose 70% alumina brick for steel, iron, nonferrous, and minerals processing applications.

DURALITE 80 G

DURALITE 80 G is a bauxite-based brick made with higher purity and more refractory raw materials than general purpose 80% alumina brick. It can be used in all applications where general purpose 80% alumina brick would normally be recommended, but operating conditions require an upgrade.

SENECA 80 XD SENECA 80 SXD

These general purpose 80% alumina brick have improved matrix chemistry over standard general purpose 80% alumina brick.

SENECA 80 KR

SENECA 80 KR is a bauxite-based 85% alumina brick with a chrome ore addition. This unique composition is used for slaglines in steel ladles with acid slags, minimal gas stirring, and no arc reheating.

R 80 B

This bauxite-based brick is made with higher purity and more refractory raw materials than general purpose 80% alumina brick.

SENECA 85

This is a general purpose, burned 85% alumina brick. It can be used in all applications where general purpose 70 or 80% alumina brick would normally be recommended, but operating conditions require an upgrade. Phos-bonded Alumina Brick is a complete line of high alumina brick in the range of 70% to 85% alumina is phosphate-bonded to give optimum strength burned brick. Along with the development of unusually high strength, these phosphate-bonded brick have low porosity, with excellent resistance to abrasion, erosion, and alkali attack.

SENECA 60 P

SENECA 60 P is a phosphate-bonded, mullite-based brick with excellent alkali resistance. It is not recommended for load bearing or in reducing atmospheres.

ALUMEX P-7

These are phosphate-bonded with high strength and load-bearing ability, low porosity and modulus of elasticity, and excellent resistance to abrasion, erosion and mechanical abuse. They are recommended for: skid rail tile in billet heating furnaces; hearths subject to severe abrasion; foundry ladles; cupola troughs, and are widely used at either end of cement kiln hot zones and in nose rings, because their low modulus of elasticity gives the products excellent resistance to torsional stresses created by rotation of the kiln.

KRIAL P-70 BF

KRIAL P-70 BF is a low iron, high strength 70 % alumina brick designed for resistance to impact, abrasion, and carbon monoxide (CO) attack in severe wear blast furnace and DRI applications.

ALUMEX P-8 · SENECA 85 P

These brick are more refractory than the ALUMEX P-7, and they possess exceptional strength. They have excellent resistance to thermal spalling and are recommended for applications where very dense brick with low porosity are required and where operating temperatures are more severe. Installed in such areas, longer service life than that obtained from refractories of lesser quality is assured. Their use have proven economical in reheat furnace skid rails, ladles, cement kilns, and where erosion, abrasion, thermal shock and extremely high temperatures are encountered.

ALUMEX P-85 HS

ALUMEX P-85 HS exhibits a combination of very high strengths, high abrasion resistance, and excellent thermal shock resistance. Its high purity composition yields a refractory product that can withstand severe alkali attack. It is recommended for use in electric furnace roofs, rotary cement kilns, reheat furnace skid rails and other furnace applications where erosion and abrasion from slag and metal are severe at high temperature. XP-85 HS ceramic anchors will be made and stocked at East Canton.

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Molten Metal Handling

Minteq offers the steel maker a complete systems solution for iron and steel ladles as well as vacuum degassing. We call this molten metal handling. Our goal is simple: improve the productivity and cost-effectiveness of the ladles by extending the life of the vessel. Our system offering ranges from individual refractory products to full monolithic steel ladle packages that includes LaCam® LI laser distance measurement, OPTIFORM® working and safety linings, pre-cast shapes for flow control and impact resistance, and gunnable and shotcrete maintenance materials.

We focus on extending the life of iron ladles by providing manual or remote application of industry-leading shotcrete and gunning materials. This application is managed and installed by Minteq field sales and steel mill service personnel.

For steel ladles we offer complete packages, as mentioned above, with a focus on enhancing existing brick systems to increase vessel life and availability. This is mainly accomplished with OPTISHOT® shotcrete products and a full line of alumina-silica and magnesia-based gunnable materials.

The vacuum degasser presents a unique opportunity for productivity enhancements through leading-edge maintenance; we have achieved substantial improvements in snorkel life with MAG-O-STAR® application of gunnable and sprayable refractory products.

We would refer all customers interested in reducing cost and improving productivity to the following pages, where we present more detailed information on our innovative, systems-based approach: refractory materials + application equipment + laser measurement + experienced sales, technical, and service personnel.

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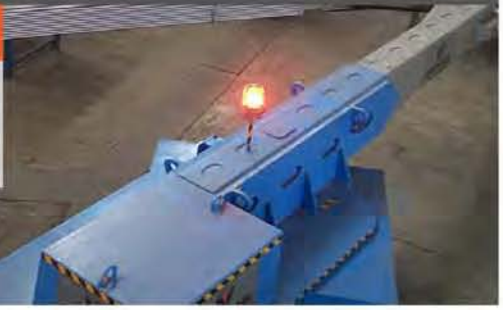

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Tundish Refractories

Tundish Spray Coating - Ferrocon SGS Series

FERROCON SGS series, sprayable coating material is a proven performer for tundish wear lining. Quick and clean deskulling property is the key success function of Ferrocon SGS series.

The technology for pneumatic placement of insulating refractories has led to the development of the Ferrocon SGS Series Spray Products. This concept has gained worldwide acceptance in many billet, bloom and slab casting facilities as a result of its simple operation.

Asmas Tundish Products

It has led to lower labor costs because of the decrease in installation time. The system occupies less space, thus is applicable for even the most congested tundish assembly areas. Ferrocon SGS can be applied with zero rebound-to any tundish- regardless of geometry.

It can be sprayed on any refractory surface up to 80°C, which enables the steelmaker to utilize residual heat in the tundish helping to cure the lining. Consumption can be optimized by placing less material in low erosion zones.

Ferrocon SGS is designed to adhere to the steel skull - not the tundish - which makes skull removal a safe, simple procedure.

Product Range:
- Ferrocon SGS LT
- Ferrocon SGS 88
- Ferrocon SGS 85
- Ferrocon SGS 80
- Ferrocon SGS 75
- Ferrocon SGS 70
- Ferrocon SGS 65
- Ferrocon SGS 60

Please contact your Asmas Representative for any further information required.

Tundish Boards and Mixes - Ferrocon and FCM Series

FERROCON Tundish Boards are designed and manufactured both in magnesite and silica compositions to match specific steel production needs.

More than 10 million tons of steel per year is continuously being cast through Ferrocon tundish boards.

FERROCON-MgO is engineered to withstand ultralong sequences of high performance meltshops.

With increasingly sophisticated end use for tundish liner products, Ferrocon MgO performances such as 85 heats of 82 tons ladle lasting 76 hours, 73 heats of 100 tons ladle lasting 63 hours and many other ultralong sequence lengths are achieved with full confidence. Ferrocon MgO is tailor-made with variable thicknesses and densities as well as unique slag line support system according to tundish design and application.

Selected raw material, thorough research, rigid process control result in the consistent quality of Ferrocon MgO tundish boards. With Ferrocon MgO, back-up lining is prolonged and tundish deskulling is an easy and simple procedure.

FERROCON-Silica is engineered in different densities from standard type to the premium MULTIPOUR to completely match the liner to user application.

Carbon and low alloy steels with less than 1.2 % manganese are routinely cast with Ferrocon Silica boards.

Ferrocon Silica offers the most economic solution for low sequence casting, which does not exceed 10 hours.

In addition to the full spectrum of liner boards, **FCM series** sealing mortar and ramming mixes produced both in silica and magnesite base to match the liner compositions are available to complete the full installation of each tundish lining.

Product Range:
- FCM 10 – Silica Ramming mix
- FCM 20 – MgO Ramming Mix
- FCM 25 – High Purity MgO Ramming Mix
- FCM 30 – Alumina Ramming Mix

- FCM 50 – Silica Sealing Mortar
- FCM 60 – MgO Sealing Mortar
- FCM 70 – Al-Si Sealing Mortar

Ferrocon Tundish Board Ready To Cast

Ferrocon Tundish Board During Casting

Ferrocon Tundish Board After Casting

Ferrocon Tundish Board After Deskulling

Dry Vibratable Working Lining - Fillmix Series

FILLMIX 85T is a magnesite based moldable water-free mix for tundish coating.

Fillmix 85T is easily filled between the permanent layer of tundish and the steel former.

The former is heated up to 250 °C by a drier unit supplying hot air circulation inside the former for 1 or 1.5 hours, and then removed by crane.

Fillmix 85T is formed at designed thickness. High density Fillmix 85T performs at long sequence lengths more than 24 hours and protects the quality of your steel.

Deskulling is a safe and quick process with Fillmix 85T, reducing downtime and lowering maintenance costs. Fillmix 85T can be used in both cold and hot tundish practices.

Fillmix 85 in Application

Tundish Castables – Ferrocast Series

FERROCAST Tundish Permanent Lining Package:

Asmas has complete facilities and thorough experience for offering tundish permant lining package. The total package includes Ferrocast castables for permanent lining, insulation lining, anchor bolts, as well as, the necessary equipment and machinery for installation, such as the template, vibrators, and material mixer. Supervision and application can be provided, if it is required.

The Ferrocast tundish package becomes steelmakers' number one choice to install their tundishes at the plant start-up phases. The Ferrocast tundish package is available for single tundish reline to complete tundishes new lining.

FERROCAST is a low cement vibratable castable, uniquely designed for permanent lining of tundishes. Alumina content can be adjustable between 60 to 85 percent to match customer needs. Ferrocast's excellent physical and chemical properties and its resistance to thermal shocks provide a safe and long lasting lining for tundishes.

Tundish Furnitures and Shapes - Caston Series

CASTON tundish shapes are designed in specific shapes and manufactured in magnesite, alumina or alumina spinel qualities according to tundish requirements.

Target boxes, delta box, impact pads, dams, weirs, baffles, nozzle cones, well blocks are manufactured with superior physical and chemical properties for safe casting and clean steel production.

Precast shapes, when combined with Ferrocon wear lining, exhibits an outstanding performance for tundish long sequences and contributes to steel cleanliness for any steel grade production.

Ready to use tundish lids are a new approach to tundish covers with precise production including molding, casting and drying. Durable tundish lids are manufactured to withstand mechanical and thermal stresses during operation.

Impact Pad

Tundish Box/Delta Box

Tundish Lid

Baffle

Precast Shape-ULC Castable

Isostatic Refractories - Ferroflow Series

Asmas has recently developed its own Isostatic Refractory Technology for Tundish flow protection and control applications. Asmas is still the sole supplier of isostatic refractory products in Turkey and uses the FERROFLOW brand name for its product series.

Isostatic pressing of carbon bonded refractory oxides is a tecnology that allows complex designs in refractories for some special applications. These special applications are mostly classified in two main groups, such as protection of the stream, and controlling the liquid steel flow from tundish to mold. The FERROFLOW products are widely used for quality steels by slab and alloy steelmakers.

Ladle Shroud (LS), is used for the protection of the steel stream from ladle to tundish. The connection of LS is done to the collector nozzle of the Ladle Slide Gate with the help of a manipulator. The LS has a submerged entry to the steel bath in theTundish. Primarily, LS application will prevent the re-oxidation of the steel, reduce the Nitrogen pickup, improve steel cleanliness and create a safer environment by eliminating splashing. There are also some secondary benefits, such as less consumption of the tundish covering compound, less tundish heat loss and less radiation from Tundish to Ladle.

Stopper Rod (SR), is used to control the steel flow from the Tundish to the Mold. The SR is fixed into the Tundish on the casting strand with the help of a steel rod, fixed into the SR, and connected to manipulator arm, which can control the SR with upward-downward movements. The SR control mechanisms can be manual-controlled or automatic-driven. The SR sits on the seat area of either a Tundish Nozzle (TN) or a Submerged Nozzle (SN), which are both casting channels out from the tundish. Under the TN, a type Tundish Shroud (TS) has to be used. The TN to TS connection can be done with various possible methods, such as either direct refractory conical connection or with the help of an exchange mechanism. Depending on the connection method, TS may have different sizes and connections from the TN to the mold. Several models are designed according to customer needs. The SN is a long, one- piece solution to allow the submerged flow directly into the mold from the Tundish.

Please contact Asmas engineers or specialists for investigating suitable design and quality for your applications.

Product Range:

- Ferroflow LS – Ladle Shroud
- Ferroflow SR – Stopper Rod
- Ferroflow TN – Tundish Nozzle
- Ferroflow TS – Tundish Shroud
- Ferroflow SN – Submerged Nozzle

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To:	Magnesita Refractories Company (mail@baconthomas.com)
Subject:	U.S. TRADEMARK APPLICATION NO. 85834316 - MAGNESITA - MAGN6029/TJM - Request for Reconsideration Denied - Return to TTAB
Sent:	7/13/2015 12:07:41 PM
Sent As:	ECOM111@USPTO.GOV
Attachments:	

UNITED STATES PATENT AND TRADEMARK OFFICE (USPTO)

IMPORTANT NOTICE REGARDING YOUR U.S. TRADEMARK APPLICATION

USPTO OFFICE ACTION (OFFICIAL LETTER) HAS ISSUED
ON **7/13/2015** FOR U.S. APPLICATION SERIAL NO. 85834316

Please follow the instructions below:

(1) TO READ THE LETTER: Click on this link or go to http://tsdr.uspto.gov, enter the U.S. application serial number, and click on "Documents."

The Office action may not be immediately viewable, to allow for necessary system updates of the application, but will be available within 24 hours of this e-mail notification.

(2) TIMELY RESPONSE IS REQUIRED: Please carefully review the Office action to determine (1) how to respond, and (2) the applicable response time period. Your response deadline will be calculated from **7/13/2015** (*or sooner if specified in the Office action*). For information regarding response time periods, see http://www.uspto.gov/trademarks/process/status/responsetime.jsp.

Do NOT hit "Reply" to this e-mail notification, or otherwise e-mail your response because the USPTO does NOT accept e-mails as responses to Office actions. Instead, the USPTO recommends that you respond online using the Trademark Electronic Application System (TEAS) response form located at http://www.uspto.gov/trademarks/teas/response_forms.jsp.

(3) QUESTIONS: For questions about the contents of the Office action itself, please contact the assigned trademark examining attorney. For *technical* assistance in accessing or viewing the Office action in the Trademark Status and Document Retrieval (TSDR) system, please e-mail TSDR@uspto.gov.

WARNING

Failure to file the required response by the applicable response deadline will result in the ABANDONMENT of your application. For more information regarding abandonment, see http://www.uspto.gov/trademarks/basics/abandon.jsp.

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Please carefully review all correspondence you receive regarding this application to make sure that you are responding to an official document from the USPTO rather than a private company solicitation. All official USPTO correspondence will be mailed only from the "United States Patent and Trademark Office" in Alexandria, VA; or sent by e-mail from the domain "@uspto.gov." For more information on how to handle private company solicitations, see http://www.uspto.gov/trademarks/solicitation_warnings.jsp.

Trademark Trial and Appeal Board Electronic Filing System. http://estta.uspto.gov

ESTTA Tracking number: **ESTTA697125**

Filing date: **09/21/2015**

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

Proceeding	85834316
Applicant	Magnesita Refractories Company
Applied for Mark	MAGNESITA
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Submission	Appeal Brief
Attachments	MAGN6029_appeal_brief_21SEP15.pdf(380451 bytes)
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Signature	/Thomas J. Moore/
Date	09/21/2015

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

Application Serial No.:	85834316
Application Filing Date:	January 28, 2013
Mark:	MAGNESITA
Owner/Applicant/Appellant:	Magnesita Refractories Company
Attorney's Reference:	MAGN6029/TJM

APPLICANT'S BRIEF

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September 21, 2015

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I. DESCRIPTION OF THE RECORD

The record is described by the Trademark Status and Document Retrieval ("TSDR") of the U.S. Patent and Trademark Office ("Office") as follows:

Date	Item
Jul. 13, 2015	ACTION DENYING REQ FOR RECON E-MAILED
May 07, 2015	EX PARTE APPEAL-INSTITUTED
May 06, 2015	TEAS REQUEST FOR RECONSIDERATION RECEIVED
Nov. 10, 2014	SUBSEQUENT FINAL EMAILED
Sep. 23, 2014	TEAS RESPONSE TO OFFICE ACTION RECEIVED
Mar. 26, 2014	NON-FINAL ACTION E-MAILED
Mar. 06, 2014	TEAS REQUEST FOR RECONSIDERATION RECEIVED
Sep. 09, 2013	FINAL REFUSAL E-MAILED
Aug. 14, 2013	TEAS RESPONSE TO OFFICE ACTION RECEIVED
Feb. 27, 2013	NON-FINAL ACTION E-MAILED
Jan. 31, 2013	NEW APPLICATION ENTERED IN TRAM

II. STATEMENT OF THE ISSUE

Whether the final Office Action dated November 10, 2014, is correct in asserting that the present mark MAGNESITA (word without design or stylization) is generic and, alternatively, the mark is highly descriptive and has not acquired distinctiveness under Section 2(f) with respect to the goods and services:

> Class 19: refractory products not primarily of metal, namely, refractory bricks, refractory mixes for patching, lining or repairing high temperature apparatus and repairing the lining for furnaces, refractory furnace patching and repair mixes; and pre-cast refractory shapes;
>
> and

Class 37: providing information via a global computer network on the use of refractory products to construct, maintain and repair refractory apparatus using refractory products; and providing information via a global computer network on the use of mechanical equipment and computer models to construct, maintain and repair refractory installations.

III. RECITATION OF THE FACTS

Applicant filed the pending application under Section 1(a) of the Trademark Act on January 31, 2013. In the first Office Action dated February 27, 2013, the Examining Attorney refused the registration of "MAGNESITA" under Section 2(e)(1) allegedly on the basis that the applied-for mark merely describes the primary component of the Applicant's goods. The Examining Attorney alleged that since the word magnesita translates to magnesite or magnesia and magnesite or magnesia is used in refractory products, the term "MAGNESITA" describes an important component of the Applicant's goods and refused its registration. In its Response dated August 14, 2013, Applicant argued that the mark is suggestive, not merely descriptive.

In a final Office Action dated September 9, 2013, the Examining Attorney alleged that the mark was merely descriptive when used in connection with the goods and services named in the application. In its Request for Reconsideration dated March 6, 2014, Applicant asserted that the mark has acquired distinctiveness under Section 2(f) of the Lanham Act to overcome the allegation that the mark is merely descriptive of the goods and services. Applicant submitted a Declaration that the mark had been in substantially exclusive and continuous use in commerce since at least as early as October 1, 2010, by Applicant.

On March 26, 2014, the Examining Attorney issued a non-final Office Action alleging that the evidence of record was not sufficient to show acquired distinctiveness because Applicant's mark was of a highly descriptive nature. The Examining Attorney further alleged that since the term "MAGNESITA" is Portuguese and is translated as magnesite, where magnesite, magnesia, or magnesium is the primary component of refractory products, the evidence of record was insufficient to show acquired distinctiveness of the mark. The Examining Attorney relied on excerpts from Hawley's Condensed Chemical Dictionary, Concise Encyclopedia of Chemical Technology, Materials Handbook, Dictionary of Materials Science, Concise Encyclopedia of Chemistry, and Scientific Encyclopedia to show that magnesite ($MgCO_3$) and magnesium oxide (MgO) can be used for refractories.

In its Response dated September 23, 2014, Applicant submitted a Declaration of Gross Sales from 2010 to 2013 to show that the gross sales of refractory products under the trademark MAGNESITA.

On November 10, 2014, the Examining Attorney issued a final Office Action which alleged that the previously submitted evidence was insufficient to support a claim of Section 2(f), since the proposed mark is considered generic with respect to applicant's goods in Class 19 and services in Class 37. The Examining Attorney alleged that the English translation of MAGNESITA is "magnesite" or "magnesia," which the Examining Attorney considered to be one of the primary components in refractory products. The Examining Attorney also asserted that even if the mark were not considered generic for the goods, the mark was certainly highly descriptive of the goods and services.

On May 6, 2015, Applicant filed a Request for Reconsideration, and submitted additional evidence of acquired distinctiveness: a Declaration of Gross Sales in 2014, in excess of US$220,000,000; and a Declaration about Exclusive Use to show that "MAGNESITA" is not used by others. Applicant also amended the date of first use to October, 2008, with supporting documentation.

Applicant filed on May 7, 2015, a Notice of Appeal to the Trademark Trial and Appeal Board, with a request for remand that was granted. The Examining Attorney on July 13, 2015, issued a Request for Reconsideration Denied, which alleged that Applicant had not resolved all the outstanding issues, and not raised a new issue or provided any new or compelling evidence. This appeal was resumed on July 22, 2015.

The Declaration About Exclusive Use filed on May 6, 2015, states as follows:

1. All statements made herein of my own knowledge are true, and all statements made on information and belief are believed to be true.
2. I have conducted searches on the Internet for web pages that offer refractory products for sale in the United States.
3. The attached exhibits are based on these searches, and accurately reflect the web page at the address at the top, and at the date and time shown at the lower right of each exhibit.
4. The attached Exhibit A shows at least the top of a web page at the alliedmineral.com website. Allied Mineral Products appears to market refractory products. I reviewed at least a portion of the website and observed use of the generic terms "castable refractories," and "precast refractory shapes." I did not observe any use of the term "magnesita" at this website.
5. The attached Exhibit B shows an image of a search for "magnesita" at the alliedmineral.com website.
6. The attached Exhibit C shows at least the top of a web page at the zircoa.com website. Zircoa appears to market refractory products. I reviewed at least a portion of the website and observed use of the generic term "refractory brick." I did not observe any use of the term "magnesita" at this website.
7. The attached Exhibit D shows at least the top of a web page at the bnzmaterials.com website. BNZ Materials, Inc. appears to market refractory products. I reviewed at least a portion of the website and observed use of the generic term "insulating firebrick." I did not observe any use of the term "magnesita" at this website.
8. The attached Exhibit E shows at least the top of a web page at the ssfbs.com website. Smith-Sharpe Fire Brick Supply appears to market refractory products. I reviewed at least a portion of the website and observed use of the generic term "fire brick." I did not observe any use of the term "magnesita" at this website.

9. The attached Exhibit F shows at least the top of a web page at the alsey.com website. Alsey refractories co. appears to market refractory products. I reviewed at least a portion of the website and observed use of the generic terms "firebrick," "mortar" and "castable." I did not observe any use of the term "magnesita" at this website.
10. The attached Exhibit G shows at least the top of a web page at the heatstoprefractorymortar.com website. Heat Stop appears to market refractory products. I reviewed at least a portion of the website and observed use of the generic terms "refractory mortar" and "firebrick." I did not observe any use of the term "magnesita" at this website.
11. The attached Exhibit H shows at least the top of a web page at the axner.com website. Axner appears to market refractory products. I reviewed at least a portion of the website and observed use of the generic terms "refractory brick" and "firebrick." I did not observe any use of the term "magnesita" at this website.
12. The attached Exhibit I shows at least the top of a web page at the firebrickengineers.com website. Fire Brick Engineers Company appears to market refractory products. I reviewed at least a portion of the website and observed use of the generic terms "refractory products" and "fire brick." I did not observe any use of the term "magnesita" at this website.
13. The attached Exhibit J shows at least the top of a web page at the morganthermalceramics.com website. Morgan Advanced Materials appears to market refractory products. I reviewed at least a portion of the website and observed use of the generic terms "fire brick," and "firebrick." I did not observe any use of the term "magnesita" at this website.
14. The attached Exhibit K shows an image of a search for "magnesita" at the morganthermalceramics.com website.
15. The attached Exhibit L shows at least the top of a web page at the ortonceramic.com website. Orton to market testing of refractory products. I reviewed at least a portion of the website and observed use

of the generic terms "refractory shapes," "refractory brick" and "refractory materials." I did not observe any use of the term "magnesita" at this website.

16. The attached Exhibit M shows at least the top of a web page at the tflhouston.com website. TFL Incorporated appears to market refractory products. I reviewed at least a portion of the website and observed use of the generic terms "firebrick," and "refractories." I did not observe any use of the term "magnesita" at this website.
17. The attached Exhibit N shows an image of a search for "magnesita" at the tflhouston.com website.
18. The attached Exhibit O shows at least the top of a web page at the hitempincusa.com website. Hi Temp Refractories to market refractory products. I reviewed at least a portion of the website and observed use of the generic terms "firebrick," and "castables." I did not observe any use of the term "magnesita" at this website.
19. The attached Exhibit P shows at least the top of a web page at the louisvillefirebrick.com website. Louisville Firebrick appears to market refractory products. I reviewed at least a portion of the website and observed use of the generic terms "firebrick," and "refractory brick." I did not observe any use of the term "magnesita" at this website.
20. The attached Exhibit Q shows at least the top of a web page at the kandg.net website. K&G Industrial Services appears to market the installation of refractory products. I reviewed at least a portion of the website and observed use of the generic term "refractory brick." I did not observe any use of the term "magnesita" at this website.
21. The attached Exhibit R shows at least the top of a web page at the firebricks.com website. Firebricks appears to market refractory products. I reviewed at least a portion of the website and observed use of the generic term "refractory bricks." I did not observe any use of the term "magnesita" at this website.

22. The attached Exhibit S shows at least the top of a web page at the elginbutler.com website. Elgin Butler appears to market refractory products. I reviewed at least a portion of the website and observed use of the generic term "fire brick." I did not observe any use of the term "magnesita" at this website.
23. The attached Exhibit T shows at least the top of a web page at the larkinrefractory.com website. Larkin Refractory Solutions appears to market refractory products. I reviewed at least a portion of the website and observed use of the generic term "fire brick." I did not observe any use of the term "magnesita" at this website.
24. The attached Exhibit U shows at least the top of the Terminology page at the larkinrefractory.com website. I observed use of the generic term "fire brick." I did not observe any use of the term "magnesita" at this website.
25. The attached Exhibit V shows at least the top of a web page at the vitcas.com website. Vitcas appears to market refractory products. I reviewed at least a portion of the website and observed use of the generic terms "fire brick," and "firebrick." I did not observe any use of the term "magnesita" at this website.
26. The attached Exhibit W shows an image of a search for "magnesita" at the vitcas.com website.
27. The attached Exhibit X shows at least the top of a web page at the nockrefractories.com website. The Nock Refractories Company appears to market refractory products. I reviewed at least a portion of the website and observed use of the generic term "fire brick." I did not observe any use of the term "magnesita" at this website.
28. The attached Exhibit Y shows at least the top of a web page at the nwironworks.com website. The Northwest Iron Works appears to market refractory products. I reviewed at least a portion of the website and observed use of the generic term "fire brick." I did not observe any use of the term "magnesita" at this website.

29. The attached Exhibit Z shows at least the top of a web page at the miamistoneinstallers.com website. Miami Stone Installers.com appears to market refractory products. I reviewed at least a portion of the website and observed use of the generic terms “firebrick” and “fire brick.” I did not observe any use of the term “magnesita” at this website.
30. The attached Exhibit AA shows at least the top of a page at the lowes.com website. Lowe’s appears to market refractory products. I reviewed at least a portion of the website and observed use of the generic term "firebrick." I did not observe any use of the term "magnesita" at this website.
31. The attached Exhibit AB shows at least the top of a page at the homedepot.com website. The Home Depot appears to market refractory products. I reviewed at least a portion of the website and observed use of the generic term "fire bricks." I did not observe any use of the term "magnesita" at this website.
32. The attached Exhibit AC shows at least the top of a page at the walmart.com website. Walmart appears to market refractory products. I reviewed at least a portion of the website and observed use of the generic terms “fire brick” and "firebrick." I did not observe any use of the term "magnesita" at this website.
33. The attached Exhibit AD shows an image of a search for “magnesita” at the walmart.com website.
34. The attached Exhibit AE shows at least the top of a page at the amazon.com website. Amazon appears to market refractory products. I reviewed at least a portion of the website and observed use of the generic terms “fire brick” and "firebrick." I did not observe any use of the term "magnesita" at this website.
35. The attached Exhibit AF shows at least the top of a page at the rescoproducts.com website. RESCO Products, Inc. appears to market refractory products. I reviewed at least a portion of the website and observed use of the generic term “brick." I did not observe any use of the term "magnesita" at this website.

36. The attached Exhibit AG shows at least the top of a page at the vesuvius.com website. Vesuvius appears to market refractory products. I reviewed at least a portion of the website and observed use of the generic term “brick." I did not observe any use of the term "magnesita" at this website.
37. The attached Exhibit AH shows at least the top of a page at the rhi-ag.com website. RHI appears to market refractory products. I reviewed at least a portion of the website and observed use of the generic term “brick." I did not observe any use of the term "magnesita" at this website.
38. The attached Exhibit AI shows at least the top of a page at the hwr.com website. ANH Refractories appears to market refractory products. I reviewed at least a portion of the website and observed use of the generic term “brick." I did not observe any use of the term "magnesita" at this website.
39. The attached Exhibit AJ shows at least the top of a page at the mineralstech.com website. Minerals Technology to market refractory products. I reviewed at least a portion of the website and observed use of the generic term “brick." I did not observe any use of the term "magnesita" at this website.

The Declaration of Gross Sales filed September 23, 2014, states as follows:

The gross sales of refractory products under the trademark MAGNESITA from May 1 to December 31, 2010 were in excess of US $103,000,000 for domestic production.

The gross sales of refractory products under the trademark MAGNESITA from January 1 to December 31, 2011 were in excess of US $200,000,000 for domestic production.

The gross sales of refractory products under the trademark MAGNESITA from January 1 to December 31, 2012 were in excess of US $200,000,000 for domestic production.

The gross sales of refractory products under the trademark MAGNESITA from January 1 to December 31, 2013 were in excess of US $230,000,000 for domestic production.

The Declaration of Gross Sales in 2014, filed May 6, 2015, states that the gross sales of refractory products associated with the trademark MAGNESITA from January 1 to December 31, 2014 were in excess of US $220,000,000 for domestic production.

IV. ARGUMENT

A. THE STANDARD OF REVIEW.

Applicant respectfully submits that the standard of review should be reconsidered in view of the Supreme Court's decision in the case *B & B Hardware, Inc. v. Hargis Industries, Inc.*, ___U.S.___, 135 S.Ct. 1293 (2015) (Ultimately, Board decisions on likelihood of confusion ... should be given preclusive effect on a case-by-case basis)." 135 S.Ct. at 1306. This subjects the present Applicant to the risk that a court may later give a Board decision preclusive effect. See also, *Vicor Corporation v. Synqor, Inc.*, 2015 WL 2172160 (Patent Tr. & App. Bd.) ("agency decision is grounds for issue preclusion in litigation" citing *B & B Hardware*).

The Supreme Court held that the "Eighth Circuit likewise erred by concluding that Hargis bore the burden of persuasion before the TTAB. B & B, the party opposing registration, bore the burden," 135 S.Ct. at 1309. The Court has instructed that burden of persuasion should be on the party opposing registration, which in the present appeal is the Examining Attorney.

Applicant acknowledges the Federal Circuit precedence arguably to the contrary. In ex parte cases, the question is simply "whether or not, based on the record before the examiner, the examiner's action was correct." *In re Bose Corp.*, 772 F.2d 866, 869, 227 USPQ 1 (Fed. Cir. 1985).

Moreover, it would be arbitrary and capricious, and an abuse of discretion, to continue different standards of review for ex parte trademark appeals versus ex parte patent appeals. *Compare*, *In re Fine*, 837 F.2d 1071, 5 USPQ2d 1596 (Fed. Cir. 1988) ("The PTO has the burden under section 103 to establish a prima facie case of obviousness [citation omitted]." 837 F.2d at 1074).

B. THE EXAMINING ATTORNEY HAS NOT ESTABLISHED CLEAR EVIDENCE TO SHOW GENERICNESS OF THE MARK.

The present refusal is based in part on the statutory provision that requires the mark to be "capable of distinguishing the applicant's goods and services." 15 U.S.C. §1091(c) (2005). Generic terms are "incapable of functioning as registrable trademarks denoting source, and are not registrable on the Principal Register under §2(f) or on the Supplemental Register." (TMEP § 1209.01(c)).

In proving genericness, the Office has the difficult burden of proving the refusal with "clear evidence" of genericness. *In re Interfashion U.S.A., Inc.*, 2006 WL 3147914 * 2 (TTAB 2006) (non-precedential) (*citing In re Merrill, Lynch, Pierce, Fenner & Smith, Inc.*, 828 F.2d 1567, 4 USPQ2d 1141, 1143 (Fed. Cir. 1987)); *see also In re Steelbuilding.com*, 415 F.3d 1293, 1296, 75 USPQ2d 1420 (Fed. Cir. 2005). "The critical issue in genericness cases is whether members of the relevant public primarily use or understand the term sought to be protected to refer to the genus of goods or services in question." *H. Marvin Ginn Corp. v. International Ass'n of Fire Chiefs, Inc.*, 782 F.2d 987, 989-90, 228 USPQ 528 (Fed. Cir. 1986)). Determining whether a mark is generic therefore involves a two-step inquiry: First, what is the genus of goods or services at issue? Second, whether the term sought to be registered or retained on the register is understood by the relevant public primarily to refer to that genus of goods or services. *H. Marvin Ginn Corp.*, 782 F.2d 990. Doubt on the issue of genericness is resolved in favor of the applicant. *In re Interfashion U.S.A., Inc.*, 2006 WL 3147914 * 3 (*citing In re Waverly Inc.*, 27 USPQ2d 1620, 1624 (TTAB 1993)). In this case, Applicant submits that the Examiner has failed to establish by clear evidence that the mark "MAGNESITA" is understood by the relevant public to be generic by primarily referring to the class of goods and services at issue, i.e., refractory products and information services.

1. THE CATEGORY OF THE GOODS AND SERVICES AT ISSUE IS REFRACTORY PRODUCTS AND INFORMATION SERVICES.

In determining the first step of genericness, Applicant submits that the category of goods and services at issue is refractory products and information services. Specifically, the goods are "refractory products not primarily of metal, namely, refractory bricks, refractory mixes for patching, lining or repairing high temperature apparatus and repairing the lining for furnaces, refractory furnace patching and repair mixes; and pre-cast refractory shapes," while the services are "providing information via a global computer network on the use of refractory products to construct, maintain and repair refractory apparatus using refractory products; and providing information via a global computer network on the use of mechanical equipment and computer models to construct, maintain and repair refractory installations."

2. THE RELEVANT PUBLIC WOULD NOT UNDERSTAND THE WORD "MAGNESITA" TO PRIMARILY REFER TO REFRACTORY PRODUCTS AND INFORMATION SERVICES.

The Examining Attorney has failed to properly identify the relevant public and provide clear evidence that the relevant public *primarily* refers to refractory products and information services by the present mark. In determining the second step of the genericness determination, the court must identify the relevant public by identifying who actually or potentially purchases or consumes the goods, and whether members of the relevant public primarily use or understand the term sought to be protected to refer to the genus of goods or services in question. *See H. Marvin Ginn Corp.*, 782 F.2d at 989; *Magic Wand, Inc. v. RDB, Inc.*, 940 F.2d 638, 641, 19 USPQ2d 1552 (Fed. Cir. 1991); *see also* TMEP § 1209.01(c). In this case, the Examining Attorney has not established that the relevant public would have understood the mark "MAGNESITA" as primarily referring to refractory products or information services.

Although the Examining Attorney alleged in the Final Action of November 10, 2014 and Denial of the Request for Reconsideration of July 13, 2015 that the proposed mark "MAGNESITA" is generic, the Examining Attorney has not provided clear evidence to support this conclusion. The Examining Attorney has not identified the relevant public. Applicant submits that since the relevant public for a genericness determination is the ***actual or potential purchaser*** of the goods or services, the relevant public in this case is any actual or potential purchaser of refractory products or information services, which in this case is the general public. *See Magic Wand, Inc.*, 940 F.2d at 641. In so doing, as is clear from the plain reading of the identification of goods in Class 19 and services in Class 37, the refractory products and information services are not limited to a particular group of customers, but to any ***actual or potential purchaser.*** In other words, since any doubt on the issue of genericness is resolved in favor of the applicant, the relevant public in this genericness determination is the general public, because the general public actually or potentially purchases the refractory products and information services. *See In re Interfashion U.S.A., Inc.*, 2006 WL 3147914 * 3.

The Examining Attorney erroneously asserts that since magnesia and magnesite may be used in the goods and services, the ingredient may be generic for the goods and services. Applicant submits that the test for genericness is not whether any ingredient may be generic for those goods and services, but rather, whether the relevant public would *primarily* use or understand the term sought to be protected to refer to the genus of goods and services in question. *See H. Marvin Ginn Corp.*, 782 F.2d at 991.

For example, this Board in *In re Tires, Tires, Tires, Inc.* held that the term "tires" was generic because the term "tires" identifies a key aspect of applicant's services, i.e., the goods sold in applicant's retail store, and the recitation of services specifically uses the term "tires" to name the subject matter of applicant's retail services. *In re Tires, Tires, Tires, Inc.*, 94 U.S.P.Q.2d 1153, 2009 WL 4075360 * 5 (TTAB 2009). Similarly, the Court of Appeals for the Federal Circuit held that the word "BUNDT" for "ring cake mix" was generic since BUNDT was the common descriptive name of the type of cake being sold. *In re Northland Aluminum Products, Inc.*, 777 F.2d 1556, 1560 (Fed. Cir. 1985).

In contrast, in the present appeal, the Examining Attorney has not provided record evidence to suggest that the term "MAGNESITA" *primarily refers* to the class of refractory products and information services. Rather, as evidenced by Exhibits A to AJ filed with the Request for Reconsideration of May 6, 2015, the relevant public would have understood that the terms "castable refractories," "precast refractory shapes," "mortar," "castable," "fire brick," and "refractory brick" are used as the generic terms for various refractory products and information services (Dec. ¶ 4-39).

The Examining Attorney cited a third party website excerpt about Applicant. "The Company benefits from some of the largest and highest quality reserves of dolomite, magnesite, and talc in the word. Magnesita also has other mineral deposits, including chromite and several clays through Brazil. The Company is able to use 80% (by volume) of its own raw materials in the production of refractories." See page 3 of the Final Office Action in the TSDR dated November 10, 2014. Further, the types of products Applicant produces include: 1) Bricks and Shapes of: Alumina, Alumina Mag Carbon/Mag, Alumina Carbon, Alumina Silicon Carbide, Bottom Pour, Doloma/Magnesia Doloma- fired and cured, Magnesia Carbon, Magnesia Chrome, Magnesia Spinel, and Pre-cast and –basic and alumina and 2) Bulk Refractories of: Castables – basic and alumina, Coatings, Dry Vibratables, Gunning Mixes, Mortars, Plastics, Ramming Mix, and Taphole Mix (at page 4 of the Final Office Action in the TSDR dated November 10, 2014). This excerpt does not support the Examining Attorney's allegation that MAGNESITA is generic.

The Examining Attorney has failed to provide clear evidence that the relevant public would have understood the term "MAGNESITA" to be generic and to *primarily refer* to refractory products and information services.

In fact, the Examining Attorney has not provided any evidence that the relevant public uses the term "MAGNESITA" to refer to any refractory product or information service. *See In re Minnetonka, Inc.*, 3 USPQ2d 1711, 1987 WL 124303 * 3 (TTAB 1987) ("This body of evidence is persuasive, and the

Examining Attorney does not claim otherwise, to show that there exists a fairly substantial number of competitors in the business of selling liquid hand soap; that none of these competitors uses the term 'soft soap' descriptively, generically or otherwise in connection with its product.") At most, the Examining Attorney has established magnesia can be used as a component of the goods sold on various websites, e.g. refractory brick, lining, etc., and has also established that other materials can be used for such refractory products. For example, as seen in the printed web-page for Vitcas provided by the Examining Attorney on July 13, 2015, the refractory mortars are high alumina refractories, e.g., 44-88% Al_2O_3 with varying concentrations of iron oxide, Fe_2O_3 (at pages 4-6 of the Request for Reconsideration Denied in the TSDR). Similarly, as seen in the printed web-page for Zircoa, the refractory backup primarily includes custom granular Zirconium Oxide in unstabilized (pure) form or stabilized (combined) with yttrium oxide, magnesium oxide, or calcium oxide for structural stability (at page 11 of the Request for Reconsideration Denied in the TSDR). What the Examining Attorney has failed to establish by clear evidence, however, is that the relevant public uses the terms magnesia or magnesite or "MAGNESITA" to *primarily refer* to the class of refractory products or information services.

In other words, Applicant submits that unlike this Board's holding in *In re Tires, Tires, Tires, Inc.* and the Federal Circuit's holding in *In re Northland Aluminum Products, Inc.*, where the proposed marks were found to be generic since the marks primarily referred to the genus of the class for the applicant's goods and services, the present mark MAGNESITA does not refer to the genus of "refractory products and information services." The Examining Attorney has not established by clear evidence that the relevant public would have understood that the term "MAGNESITA" *primarily refers* to the class of goods and services for refractory products and information services.

The present goods and services are not magnesia or magnesite, where magnesite has the chemical formula $MgCO_3$ and is used to produce magnesia having the chemical formula MgO. Rather, the present goods are "refractory products not made primarily of metal" and services for "providing information via a global computer network on the use of refractory products." Magnesite is a compound in Class 1 and not in Class 19 or 37. In other words, while magnesia and magnesite are generic terms to identify different minerals, the Examining Attorney has not provided clear evidence to establish that magnesia and magnesite are generic terms to *primarily* identify refractory products or information services. *See In re Interfashion U.S.A., Inc.*, 2006 WL 3147914 *3 ("The two references to "Oat Straw" hair care preparations which appear to be generic in nature do not constitute a clear or substantial showing of generic use.")

The Examining Attorney has failed to establish by clear evidence that the relevant public uses the term "MAGNESITA" to *primarily refer* to refractory products or information services and only has established that magnesia and magnesite can be used as one component of refractory brick or lining, which can also include alumina, zirconium, silica, yttrium, calcium, etc. as primary ingredients. Thus, this Board must conclude that "MAGNESITA" is not generic for the Applicant's refractory products of Class 19 or information services of Class 37.

C. THE MARK "MAGNESITA" HAS ACQUIRED DISTINCTIVENESS

The statute allows the registration of "a mark used by the applicant which has become distinctive of the applicant's goods in commerce." 15 U.S.C. §1052(f) (2005). The "Director may accept as prima facie evidence that the mark has become distinctive, as used on or in connection with the applicant's goods in commerce, proof of substantially exclusive and continuous use thereof as a mark by the applicant in commerce for the five years before the date on which the claim of distinctiveness is made." 15 U.S.C. § 1052(f).

The amount and character of such evidence depends on the facts of each case, however, necessarily varies, depending upon the degree of descriptiveness involved, and becomes progressively greater as the descriptiveness of the term increases. *In re Mine Safety Appliances Co.*, 66 U.S.P.Q.2d 1694 * 3 (TTAB 2002) (non-precedential) (*citing Yamaha Int'l Corp. v. Hoshino Gakki Co.*, 840 F.2d 1572, 6 USPQ2d 1001, 1008 (Fed. Cir. 1988)); *In re Whitetail Inst. Of North America, Inc.*, 2014 WL 1390517 * 2 (TTAB 2014) (non-precedential). "To show that a mark has acquired distinctiveness, an applicant must demonstrate that the relevant public understands the primary significance of the mark as identifying the source of a product or service rather than the product or service itself." *In re Steelbuilding.com*, 415 F.3d 1293, 75 U.S.P.Q.2d 1420, 1422 (Fed. Cir. 2005).

1. THE MARK "MAGNESITA" IS NOT HIGHLY DESCRIPTIVE.

In determining whether a mark is highly descriptive, the Board should initially determine whether the Examining Attorney has submitted evidence to establish that the mark immediately tells prospective customers about the features of applicant's goods or services, and then whether the record has a sufficient number of references to establish that the mark is highly descriptive. *See In re Greek Gourmet, Inc.*, 2000 WL 1720159 * 2 (TTAB 2000) (non-precedential); *see also In re the Kyjen Company, Inc.*, 2012 WL 1424429 * 6 (TTAB 2012) (non-precedential), *In re Whitetail Inst. Of North America, Inc.*, 2014 WL 1390517 * 3 (TTAB 2014).

The Examining Attorney has not provided the necessary evidence to establish that the mark "MAGNESITA" is highly descriptive of Applicant's goods and services. Although the Examining Attorney has provided evidence that magnesia or magnesite can be used in refractory products, the Examining Attorney has not provided evidence that the mark "MAGNESITA" is highly descriptive of "refractory products not primarily of metal, namely, refractory bricks, refractory mixes for patching, lining or repairing high temperature apparatus and repairing the lining for furnaces, refractory furnace patching and repair mixes; and pre-cast refractory shapes," and "providing information via a global computer network on the use of refractory products to construct, maintain and repair refractory apparatus using refractory products; and providing information via a global computer network on the use of mechanical equipment and computer models to construct, maintain and repair refractory installations."

Specifically, the Examining Attorney has not provided the necessary evidence to establish that the mark "MAGNESITA" immediately tells prospective customers about the features of Applicant's goods or services. Rather, the Examining Attorney only provides evidence that the English translation of "MAGNESITA" is "magnesite" or "magnesia." While the Examining Attorney has not cited a case where the doctrine of foreign equivalents has been applied in the context of an assertion of acquired distinctiveness, Applicant submits that even assuming, but not admitting that "MAGNESITA" would be understood by a significant portion of the relevant potential purchasers to mean "magnesite" or "magnesia," the Examining Attorney has not placed into the record sufficient references to establish that "magnesite" or "magnesia" is highly descriptive of the refractory products in Class 19 or information services in Class 37. The Examining Attorney only points to web page excerpts that show magnesia or magnesite can be a component of refractory products.

Applicant, however, does not observe any evidence that the present mark "MAGNESITA," immediately tells prospective customers about a feature of Applicant's "refractory products not primarily of metal, namely, refractory bricks, refractory mixes for patching, lining or repairing high temperature apparatus and repairing the lining for furnaces, refractory furnace patching and repair mixes; and pre-cast refractory shapes," and "providing information via a global computer network on the use of refractory products to construct, maintain and repair refractory apparatus using refractory products; and providing information via a global computer network on the use of mechanical equipment and computer models to construct, maintain and repair refractory installations."

That is, while the term "magnesite" may be merely descriptive, the record does not establish that the mark MAGNESITA is highly descriptive of refractory products and information services.

Applicant submits, similar to the Board's holding in *In re Greek Gourmet Inc.* (where the Board held that if the "mark "GREEK GOURMET" was highly descriptive, if not generic, as contended by the Examining Attorney, then it is hard to understand how there were fewer than 70 references to this term during a time span of nearly 30 years"), in the present appeal this Board should find that since the Examining Attorney has not provided any evidence that the mark "MAGNESITA" has been used in connection with describing refractory products or information services, the record dictates the only conclusion, that the mark "MAGNESITA" is not highly descriptive of the recited refractory products or information services.

Applicant submits that the Examining Attorney has only provided evidence that magnesia or magnesite can be used in refractory products. Applicant, however, does not observe any evidence that the mark "MAGNESITA" is used to describe any specific type of refractory product or information service. In fact, as evidenced by the declaration filed May 6, 2015, Applicant has not found any instance where the mark "MAGNESITA" was used to describe the refractory product, but rather, only observed the generic terms "castable refractories," "precast refractory shapes," "mortar," "castable," "fire brick," and "refractory brick" as being used to describe the refractory products and information services. In other words, Applicant submits that since the Examining Attorney has not provided any evidence that the terms magnesia, and magnesite, let alone the mark "MAGNESITA" have been used to describe refractory products and information services, the mark "MAGNESITA" cannot be highly descriptive of the recited products or services.

2. THE MARK HAS ACQUIRED DISTINCTIVENESS BECAUSE OF MORE THAN FIVE YEARS OF SUBSTANTIALLY EXCLUSIVE AND CONTINUOUS USE.

The amount and character of evidence to establish acquired distinctiveness depends on the facts of each case, and becomes progressively greater as the descriptiveness of the term increases. *In re Mine Safety Appliances Co.*, 66 U.S.P.Q.2d 1694 * 3 (TTAB 2002) (non-precedential); *In re the Kyjen Company, Inc.*, 2012 WL 1424429 * 6 (TTAB 2012) (non-precedential); *In re Whitetail Inst. Of North America, Inc.*, 2014 WL 1390517 * 2 (TTAB 2014) (non-precedential). Since the mark "MAGNESITA" is not highly descriptive of Applicant's goods and services, the Director should accept as prima facie evidence that the mark has become distinctive with proof of substantially exclusive and continuous use for more than five years.

The Examining Attorney has erred by not fully considering Applicant's claim of acquired distinctiveness based. Applicant submits that the mark "MAGNESITA" is at most merely descriptive and not highly descriptive of Applicant's "refractory products not primarily of metal, namely, refractory bricks, refractory mixes for patching, lining or repairing high temperature apparatus and repairing the lining for furnaces, refractory furnace patching and repair mixes; and pre-cast refractory shapes," and "providing information via a global computer network on the use of refractory products to construct, maintain and repair refractory apparatus using refractory products; and providing information via a global computer network on the use of mechanical equipment and computer models to construct, maintain and repair refractory installations."

The Examiner should have accepted the declarations filed September 23, 2014 and May 6, 2015 as prima facie evidence that the mark has acquired distinctiveness based on the more than five years of exclusive and continuous use of the mark "MAGNESITA." The Declaration of Gross Sales establishes that the mark MAGNESTITA has been used in association with the sale of refractory products in excess of US $103,000,000 in 2010, in excess of US $200,000,000 in 2011, in excess of US $200,000,000 in 2012, in excess of US $230,000,000 in 2013, and in excess of $220,000,000 in 2014. Applicant has exclusively used the mark "MAGNESITA" in commerce since 2008. That is, Applicant has sold more than almost 1 billion dollars of refractory products during this period under the mark MAGNESITA, which clearly establishes that the mark MAGNESITA indicates that Applicant is the source of the goods and services.

V. SUMMARY

The application should be approved for registration on the Principal Register because the mark "MAGNESITA" is not generic and has acquired distinctiveness. Applicant respectfully requests that this Board reverse the refusal of registration.

Respectfully submitted,

/Thomas J. Moore/

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UNITED STATES PATENT AND TRADEMARK OFFICE (USPTO)

U.S. APPLICATION SERIAL NO. 85834316

MARK: MAGNESITA

CORRESPONDENT ADDRESS:

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ALEXANDRIA, VA 22314-1169

GENERAL TRADEMARK INFORMATION:

http://www.uspto.gov/trademarks/index.jsp

TTAB INFORMATION:

http://www.uspto.gov/trademarks/process/appeal/index.jsp

APPLICANT: Magnesita Refractories Company

CORRESPONDENT'S REFERENCE/DOCKET NO:

MAGN6029/TJM

CORRESPONDENT E-MAIL ADDRESS:

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EXAMINING ATTORNEY'S APPEAL BRIEF

INTRODUCTION

In this case the applicant appeals the Trademark Examining Attorney's Final Refusal under Section 2(e)(1) of the Trademark Act as merely descriptive of the proposed mark, MAGNESITA, for "refractory products not primarily of metal, namely, refractory bricks, refractory mixes for patching, lining or repairing high temperature apparatus and repairing the lining for furnaces, refractory furnace patching and repair mixes; and pre-cast refractory shapes" and for "providing information via a global computer network on the use of refractory products to construct, maintain and repair refractory apparatus using refractory products; and providing information via a global computer network on the use of mechanical equipment and computer models to construct, maintain and repair refractory installations." The applicant also appeals a Final Refusal of the applicant's claim of acquired distinctiveness under Section 2(f) of the Trademark Act.

The examining attorney respectfully requests that the Board affirm the refusal to register the proposed mark.

STATEMENT OF THE CASE

On January 28, 2013, the applicant filed an application for the mark, MAGNESITA for "refractory products not primarily of metal, namely, refractory bricks, refractory mixes for patching, lining or repairing high temperature apparatus and repairing the lining for furnaces, refractory furnace patching and repair mixes; and pre-cast refractory shapes" and for "providing information via a global computer network on the use of refractory products to construct, maintain and repair refractory apparatus using refractory products; and providing information via a global computer network on the use of mechanical equipment and computer models to construct, maintain and repair refractory installations."

On February 27, 2013, the examining attorney issued an office action refusing the proposed mark under Section 2(e)(1) as merely descriptive and required a translation of MAGNESITA. On August 14, 2013, the applicant responded to the refusal to register and amended the application with the translation of MAGNESITA AS "magnesite" or "magnesia."

On September 9, 2013, the examining attorney issued a Final Refusal under Section 2(e)(1) of the Trademark Act because the mark is merely descriptive as applied to the applicant's goods and services. On March 6, 2014, the applicant responded to the Final Refusal by claiming that the proposed mark had acquired distinctiveness, based on evidence alone, under Section 2(f) of the Trademark Act. The applicant's only evidence of acquired distinctiveness was a Canadian Registration. On March 26, 2014, the examining attorney withdrew the Final Refusal to refuse the applicant's insufficient Section 2(f) claim of acquired distinctiveness.

On September 23, 2014, the applicant responded to the examining attorney's refusal of the applicant's Section 2(f) claim of acquired distinctiveness. On November 10, 2014, the examining attorney issued a Final Refusal of the Section 2(f) claim because the mark is generic as applied to the applicant's goods and related services.

On May 6, 2015, the applicant filed a request for reconsideration of the Final Refusal of the applicant's Section 2(f) claim of acquired distinctiveness. On July 13, 2015, the examining attorney denied the applicant's request for reconsideration.

ISSUES ON APPEAL

Whether the proposed mark, MAGNESITA, has been properly refused registration under Section 2(f) as generic in connection with the goods and services in the application under Section 2(e)(1); 15 U.S.C. §1052(e)(1).

ARUGMENTS

Section 2(f) Claim Is An Admission That the Mark Is Descriptive

The examining attorney initially refused registration under Section 2(e)(1) and the applicant responded by amending the application to assert a claim of acquired distinctiveness under Section 2(f). According to TMEP §1212.02(b) a claim of distinctiveness under §2(f), whether made in the application as filed or in a subsequent amendment, may be construed as conceding that the matter to which it pertains is not inherently distinctive and, thus, not registrable on the Principal Register absent proof of acquired distinctiveness. See Cold War Museum, Inc. v. Cold War Air Museum, Inc., 586 F.3d 1352, 92 USPQ2d 1626, 1629 (Fed. Cir. 2009) ("Where an applicant seeks registration on the basis of Section 2(f), the mark's descriptiveness is a nonissue; an applicant's reliance on Section 2(f) during prosecution presumes that the mark is descriptive."). For the purposes of establishing that the subject matter is not inherently distinctive, the examining attorney may rely on this concession alone. Once an applicant has claimed that matter has acquired distinctiveness under §2(f), the issue to be determined is not whether the matter is inherently distinctive but, rather, whether it has acquired distinctiveness.

See, e.g., Yamaha Int'l Corp. v. Hoshino Gakki Co. , 840 F.2d 1572, 1577, 6 USPQ2d 1001, 1005 (Fed. Cir. 1988); In re Cabot Corp., 15 USPQ2d 1224, 1229 (TTAB 1990); In re Prof'l Learning Ctrs., Inc., 230 USPQ 70, 71 (TTAB 1986); In re Chopper Indus., 222 USPQ 258, 259 (TTAB 1984).

Section 2(f) Claim Insufficient

As an initial matter, the applicant's claim of acquired distinctiveness under Section 2(f) is insufficient. The applicant initially asserted a claim of acquired distinctiveness under Section 2(f) in its March 6, 2014 response. The only evidence of acquired distinctiveness submitted with that response was a Canadian registration. After the examining attorney's initial refusal of the Section 2(f) claim, the applicant responded by submitting sales figures for the three and a half years the applicant had been operating in the United States. No other evidence of acquired distinctiveness was submitted.

As was discussed in the examining attorney's office action dated March 26, 2014, there are several factors to be weighed when examining evidence of acquired distinctiveness based on extrinsic evidence: (1) length and exclusivity of use of the mark in the United States by applicant; (2) the type, expense, and amount of advertising of the mark in the United States; and (3) applicant's efforts in the United States to associate the mark with the source of the goods and/or services, such as unsolicited media coverage and consumer studies. See In re Steelbuilding.com, 415 F.3d 1293, 1300, 75 USPQ2d 1420, 1424 (Fed. Cir. 2005); Bd. of Trs. v. Pitts, Jr., 107 USPQ2d 2001, 2016 (TTAB 2013). A showing of acquired distinctiveness need not consider all these factors, and no single factor is determinative. In re Steelbuilding.com, 415 F.3d at 1300, 75 USPQ2d at 1424; see TMEP §§1212.06 et seq. The USPTO will decide each case on its own merits.

As was discussed above, at the time of the applicant's initial claim of acquired distinctiveness, the applicant had only been operating in the United States for three and a half years. The applicant did not submit any evidence of the marketing and advertising programs in the United States. The applicant did not outline any efforts it made to associate the mark with any of its goods or services listed in the application, nor did it outline its advertising and promotional expenditures. In the request for reconsideration dated May 6, 2015, the applicant did submit another year of sales figures and an article written about the applicant that appeared in a trade magazine.

Due to the highly descriptive nature of the proposed mark, MAGNESITA, in relation to "refractory products not primarily of metal, namely, refractory bricks, refractory mixes for patching, lining or repairing high temperature apparatus and repairing the lining for furnaces, refractory furnace patching and repair mixes; and pre-cast refractory shapes" and for "providing information via a global computer network on the use of refractory products to construct, maintain and repair refractory apparatus using refractory products; and providing information via a global computer network on the use of mechanical equipment and computer models to construct, maintain and repair refractory installations," the Section 2(f) claim is insufficient.

In the event that the Board finds as a preliminary matter that the applicant's evidence is substantial and sufficient enough to support a Section 2(f) claim of acquired distinctiveness, the examining attorney submits that the Section 2(f) claim fails because the proposed mark is generic as applied to the applicant's goods.[1]

Proposed Mark Is Generic for the Refractory Products

And Related Information Services

Generic terms require refusal because they are common names that the relevant purchasing public understands primarily as describing the genus of the applicant's goods or services. *In re Dial-A-Mattress Operating Corp.,* 240 F.3d 1341, 1344, 57 USPQ 2d 1807, 1810 (Fed. Cir. 2001);

[1] A discussion of the sufficiency of the Section 2(f) claim with respect to the services in International Class 37 was never reached because of the paltry nature of the evidence submitted with the applicant's responses.

H.Marvin Ginn Corp v. Int'l Ass'n of Fire Chiefs, Inc., 782 F.2d 987, 989-90, 228 USPQ 528, 530 (Fed. Cir.1986). *See* TMEP §1209.01(c). Generic terms, by definition incapable of indicating source, are the antithesis of trademarks, and can never attain trademark status. *In re Merrill Lynch, Pierce, Fenner, & Smith, Inc.,* 828 F.2d 1567, 1569, 4 USPQ2d 1141, 1142 (Fed.Cir. 1987); *see* TMEP §1209.01(c). Refusal is required because registering generic terms "would grant the owner of [a] mark a monopoly, since a competitor could not describe the goods as they are. *In re Merrill Lynch, Pierce, Fenner, & Smith, Inc.,*828 F.2d at 1569, 4 USPQ2d at 1142.

Determining whether a mark is generic requires a two-step inquiry:

> (1) What is the genus of goods and/or services at issue?
>
> (2) Does the relevant public understand the designation primarily to refer to that genus of goods and/or services?

In re 1800Mattress.com IP, LLC, 586 F.3d 1359, 1363, 92 USPQ2d 1682, 1684 (Fed. Cir. 2009) (quoting H. Marvin Ginn Corp. v. Int'l Ass'n of Fire Chiefs, Inc., 782 F.2d 987, 989-90, 228 USPQ 528, 530 (Fed. Cir. 1986)); TMEP §1209.01(c)(i).

Regarding the first part of the inquiry, the genus of the goods and/or services is often defined by an applicant's identification of goods and/or services. See In re Country Music Ass'n, 100 USPQ2d 1824, 1827-28 (TTAB 2011) (citing Magic Wand Inc. v. RDB Inc., 940 F.2d 638, 640, 19 USPQ2d 1551, 1552 (Fed. Cir. 1991)).

In this case, the identification, and thus the genus, is “Refractory products not made primarily of metal, namely, refractory bricks, refractory mixes for patching, lining or repairing high temperature apparatus and repairing the lining for furnaces, refractory furnace patching and repair mixes”. This application also includes services for “providing information via a global computer network on the use of refractory products to construct, maintain and repair refractory apparatus using refractory products; and providing information via a global computer network on the use of mechanical equipment and computer models to construct, maintain and repair refractory installations.”[2]

Regarding the second part of the inquiry, the relevant public is the purchasing or consuming public for the identified goods and/or services. Frito-Lay N. Am., Inc. v. Princeton Vanguard, LLC, 109 USPQ2d 1949, 1952 (TTAB 2014) (citing Magic Wand Inc. v. RDB Inc., 940 F.2d at 640, 19 USPQ2d at 1553). In this case, the relevant public is large industrial operations that require large scale refractory apparatus.

Determining whether an applied-for mark is generic turns on if “the relevant public primarily uses or understands the mark to refer to the category or [genus] of goods [and/or services] in question.” In re Nordic Naturals, Inc., 755 F.3d 1340, 1342, 111 USPQ2d 1495, 1497 (Fed. Cir. 2014); see H. Marvin Ginn Corp. v. Int’l Ass’n of Fire Chiefs, Inc., 782 F.2d 987, 989-90, 228 USPQ 528, 530 (Fed. Cir. 1986); TMEP §1209.01(c). In such a determination, the “relevant public” represents the purchasing or consuming public for the identified goods and/or services. Frito-Lay N. Am., Inc. v. Princeton Vanguard, LLC, 109 USPQ2d 1949, 1952 (TTAB 2014) (citing Magic Wand Inc. v. RDB Inc., 940 F.2d 638, 640, 19 USPQ2d 1551, 1553 (Fed. Cir. 1991)).

The applicant states that the examining attorney has not demonstrated that the relevant purchasing public for the applicant's goods and services is large-scale industrial consumers. The examining attorney points to the article submitted by the applicant (Applicant's Request for Reconsideration, May 6, 2015, page 2) that discusses the fact that in Brazil, Magnesita controls 70% of the steel refractories market and 80% of the cement refractories market. Steel and cement refractories are not the general public consumers. They are large scale industrial consumers. Moreover, the applicant's declaration discusses sales of the refractory products in "metric tons, " which also points to large scale industry. The applicant does not state that it only offers its goods and services to industrial customers; however, the article states that the applicant is attempting to expand its customer base by acquiring the German company. The article also discusses the large scale expansion into other parts of the world the applicant hopes to achieve through the acquisition of the German company.

Key Component of the Goods And Services

As discussed above, the applicant' goods are "refractory bricks, refractory mixes for patching, lining or repairing high temperature apparatus and repairing the lining for furnaces, refractory furnace patching and repair mixes; and pre-cast refractory shapes." The applicant states that the examining attorney is erroneous in her assertion that because magnesia or magnesite is a component of the applicant's goods, the term is generic when used in connection with the goods.

The name of an ingredient, a key aspect, a central focus or feature, or a main characteristic of goods and/or services may be generic for those goods and/or services. *See In re Hotels.com LP*, 573 F.3d 1300, 1304, 91 USPQ2d 1532, 1535 (Fed. Cir. 2009) (affirming the Trademark Trial and Appeal Board's holding of HOTELS.COM as generic for travel agency services, namely, making reservations and bookings for temporary lodging, and providing information about temporary lodging); *In re Meridian Rack &*

Pinion, 114 USPQ2d 1462, 1465-66 (TTAB 2015) (holding BUYAUTOPARTS.COM generic for on-line retail store services featuring auto parts); *In re Tires, Tires, Tires, Inc.*, 94 USPQ2d 1153, 1157 (TTAB 2009) (holding TIRES TIRES TIRES generic for retail tire store services); *In re Cent. Sprinkler Co.*, 49 USPQ2d 1194, 1199 (TTAB 1998) (holding ATTIC generic for automatic sprinklers for fire protection used primarily in attics); TMEP §§1209.01(c) *et seq.*; *see also In re Northland Aluminum Prods. Inc*., 777 F.2d 1556, 1559-60, 227 USPQ 961, 963-64 (Fed. Cir. 1985) (holding BUNDT generic for cake mix); *In re A La Vieille Russie, Inc.*, 60 USPQ2d 1895, 1900 (TTAB 2001) (holding RUSSIANART generic for art dealership services); *A.J. Canfield Co. v. Honickman*, 808 F.2d 291, 292, 1 USPQ2d 1364, 1365 (3d Cir. 1986) (holding CHOCOLATE FUDGE generic for diet sodas). Thus, a term does not need to be the name of a specific product and/or service to be found generic. *See In re Eddie Z's Blinds & Drapery, Inc.*, 74 USPQ2d 1037, 1042 (TTAB 2005) (holding BLINDSANDDRAPERY.COM generic for online retail store services featuring blinds, draperies, and other wall coverings); *In re Candy Bouquet Int'l, Inc.*, 73 USPQ2d 1883, 1888 (TTAB 2004) (holding CANDY BOUQUET generic for "retail, mail, and computer order services in the field of gift packages of candy"); *In re Ricci-Italian Silversmiths, Inc.*, 16 USPQ2d 1727, 1729-30 (TTAB 1990) (holding ART DECO generic for flatware); *In re Hask Toiletries, Inc.*, 223 USPQ 1254, 1255 (TTAB 1984) (holding HENNA 'N' PLACENTA generic for hair conditioner).

In the office action dated March 26, 2015, the examining attorney attached excerpts from different chemical dictionaries. On page 2 of that office actions is a page from *Hawley's Condensed Chemical Dictionary, Fourteenth Ed.,* ©2001, that define magnesia, magnesite and dead-burned magnesite. The dictionary states that magnesite is often used as a synonym for magnesia. The dictionary also states that dead burned magnesite is suitable as a refractory. In the *Concise Encyclopedia of Chemical Technology, Firth Ed., vol 2, ©*2007, (Office Action dated March 26, 2014, page 7) magnesium oxide is discussed as the principle commercial forms of magnesia. The primary uses of the goods are for metallurgical furnace products. The applicant's clients include many steel refractories.

On page 11 of the same office action, the *Materials Handbook, Fourteenth Ed,* © 1997, states that magnesite is used in the manufacture of bricks for basic refractory furnace linings. Finally, on page 15 of the March 26, 2014, office action, the *McGraw-Hill Dictionary of Materials Science, © 2003,* defines magnesia refractory as heat and corrosion resistant material made of magnesium oxide used in cement or brick form to line high-temperature process vessels or furnaces. In the article attached to the applicant's May 6, 2015, request for reconsideration on page 2, the first line of the article refers to the applicant as a leading Brazilian magnesite producer.

It is possible that not every product produced by the applicant contains magnesite; however, it is clear that magnesite or magnesia is an important component in refractory products. The applicant's goods are refractory products. The applicant attempted to amend the application to proceed under Section 2(f), which is an acknowledgement that the proposed mark MAGNESITA describes the goods. The applicant's goods are made with magnesia or magnesite. It should be noted that the article submitted by the applicant (Applicant's Request for Reconsideration, May 6, 2015, page 2) discusses the fact that it is "Brazil's leading **magnesite** producer" and it has acquired a German "**refractories** group, gaining a global customer base and raw material supply. (emphasis supplied) In fact, the applicant touts "[there will be] no other company like ours in the **refractory industry**." The applicant will offer "a range of **magnesite** . . .**products** to its combined customer base . . ."(emphasis supplied) Therefore, contrary to applicant's assertion, it is clear that applicant's proposed mark is generic for applicant's refractory goods and services.

Translation of Foreign Wording

Under the doctrine of foreign equivalents, a mark that consists of or comprises a word or words from a modern foreign language will be translated into English to determine genericness. *Palm Bay Imps., Inc. v. Veuve Clicquot Ponsardin Maison Fondee en 1772*, 396 F.3d 1369, 1377, 73 USPQ2d 1689, 1696 (Fed. Cir. 2005); *see In re Sambado & Son Inc.*, 45 USPQ2d 1312, 1315 (TTAB 1997); TMEP §1209.03(g).

The doctrine is applied when it is likely that an ordinary American purchaser would "stop and translate" the foreign term into its English equivalent. *Palm Bay Imps., Inc. v. Veuve Clicquot Ponsardin Maison Fondee en 1772*, 396 F.3d at 1377, 73 USPQ2d at 1696 (quoting *In re Pan Tex Hotel Corp.*, 190 USPQ 109, 110 (TTAB 1976)); *cf.* TMEP §1207.01(b)(vi)(A). The ordinary American purchaser refers to "all American purchasers, including those proficient in a non-English language who would ordinarily be expected to translate words into English." *In re Spirits Int'l, N.V.*, 563 F.3d 1347, 1352, 90 USPQ2d 1489, 1492 (Fed. Cir. 2009); *see In re Thomas*, 79 USPQ2d 1021, 1024 (TTAB 2006) (citing J. Thomas McCarthy, *McCarthy on Trademarks & Unfair Competition* §23:36 (4th ed., rev. 2006), which states "[t]he test is whether, to those American buyers familiar with the [modern] foreign language, the word would denote its English equivalent.").

Generally, the doctrine is applied when the English translation is a literal and exact translation of the foreign wording. *See In re Oriental Daily News, Inc.*, 230 USPQ 637, 638 (TTAB 1986); *In re Zazzara*, 156 USPQ 348, 348 (TTAB 1967); TMEP §1209.03(g).

In the applicant's response to the first office action dated August 14, 2013, the applicant amended the application to include the translation of MAGNESITA as "magnesite" or "magnesia." The examining attorney has also included translations of MAGNESITA as "magnesite" or "magnesia" from Spanish or Portuguese. The translations are attachments to the office action dated February 27, 2013. Common, modern languages include Spanish, French, Italian, German, Chinese, Japanese, Russian, Polish, Hungarian, Serbian and Yiddish. *See, e.g.*, *Weiss Noodle Co. v. Golden Cracknel & Specialty Co.*, 290 F.2d 845, 129 USPQ 411 (C.C.P.A. 1961) (Hungarian); *In re Aquamar, Inc.*, 115 USPQ2d 1122 (TTAB 2015) (Spanish); *In re Tokutake Indus. Co.*, 87 USPQ2d 1697 (TTAB 2008) (Japanese); *In re Joint-Stock Co. "Baik,"* 80 USPQ2d 1305 (TTAB 2006) (Russian); *In re Oriental Daily News, Ltd.*, 230 USPQ 637 (TTAB 1986) (Chinese); *In re Ithaca Indus., Inc.*, 230 USPQ 702 (TTAB 1986) (Italian); *In re Jos. Schlitz Brewing Co.*, 223 USPQ 45 (TTAB 1983) (German); *In re Westbrae Natural Foods, Inc.*, 211 USPQ 642 (TTAB 1981) (Japanese); *In re Optica Int'l*, 196 USPQ 775 (TTAB 1977) (French); *In re Bagel Nosh, Inc.*, 193 USPQ 316 (TTAB 1976) (Yiddish); *In re Hag Aktiengesellschaft*, 155 USPQ 598 (TTAB 1967) (Serbian); *In re New Yorker Cheese Co.*, 130 USPQ 120 (TTAB 1961) (Polish).

In the applicant's request for reconsideration dated May 6, 2015, the applicant attached copies of various websites for refractory products. The applicant's attorney conducted a search of many websites featuring refractory products. The applicant's attorney attached a declaration attesting to the fact that he conducted a search for the term MAGNESITA on all these websites and did not find the term MAGNESITA on any of these websites. The websites attached are all English language websites. The examining attorney submits that even though the word MAGNESITA is not found on the English language websites provided by the applicant or in English language dictionaries, this is not probative. That is because the foreign equivalent of a merely descriptive English word is no more registrable than the English word itself. "[A] word taken from a well-known foreign modern language, which is, itself, descriptive of a product, will be so considered when it is attempted to be registered as a trade-mark in the United States for the same product. *In re N.Paper Mills,* 64 F.2d 998, 1002, 17 USPQ 492, 493 (C.C.P.A. 1933) See *In re Tokutake Indus. Co.,* 87 USPQ2d 1697 (TTAB 2008) (AYUMI and its Japanese-character equivalent held merely descriptive for footwear where the evidence, including applicant's own admissions, indicated that the primary meaning of applicant's mark is "walking"); *In re Oriental Daily News, Inc.,* 230 USPQ 637 (TTAB 1986) (Chinese characters that mean ORIENTAL DAILY NEWS held merely descriptive of newspapers); *In re Geo. A. Hormel & Co.,* 227 USPQ 813 (TTAB 1985) (SAPORITO, an Italian word meaning "tasty," held merely descriptive because it describes a desirable characteristic of applicant's dry sausage).

Furthermore, the examining attorney conducted her own search of those same websites for the term "magnesite" or "magnesia." The results are attached to the denial of the request for reconsideration, dated July, 13, 2015. The examining attorney searched these terms in connection with specific products listed on the websites provided by the applicant. Magnesium Oxide, Magnesia and Magnesite are used interchangeably. (Examining Attorney's Denial of the Request for Reconsideration, July 13, 2015, page 7) Many of the product information sheets list magnesium oxide as a component of the refractory bricks or other refractory product.

As was discussed in the Denial of the Request for Reconsideration, July 13, 2015, none of the websites list “magnesita” as a component of any of the goods. All of these websites are English language websites; therefore, a Portuguese or Spanish language term would not be expected on any of these websites. However, magnesium oxide, magnesite and magnesia do appear on the product specifications sheets for a variety of the refractory products listed on these websites.

For example, the Zicoa.com website may not have “magnesita” listed as an input in its refractory products. However, the website does state that magnesia is a component in its Zircoa backup products. On the website Firebrickengineers.com, “magnesita” is not mentioned but magnesia is mentioned as a component of its Ladlemax products. The Mineraltec.com website does not list “magnesita” as a component of any of the goods but MgO the chemical symbol for magnesium oxide is listed as a component of the applicant’s goods. (*See* Denial of the Request for Reconsideration, July 13, 2015, pages 11-28)

Meanwhile, the applicant attached many websites that are not relevant to this application. For example, the applicant also attached excerpts of websites from Wal-Mart®, Home Depot® and Lowe’s®, which are large retailers that sell thousands of different product to the general public. These retailers sell one or two refractory products for residential use. However, the applicant is a large scale industrial supplier of refractory products to the steel and cement industries, among other industries. The applicant has also attached other websites that are tangentially related to refractory products, such as a company that tests “thermal process verification, thermo-analytical instruments and materials testing services” for refractory products.

The applicant's mark, MAGNESITA, translates to magnesite or magnesia, which is a component of the applicant's refractory products in International Class 19. The proposed mark is also generic for the provision of information via global computer network on the use of refractory products to construct, maintain, and repair refractory apparatus using refractory products and the provision of information via global computer network on the use of mechanical equipment and computer models to construct, maintain, and repair refractory installations in International Class 37 because the services relate to magnesite or magnesia as components of the refractory products. Therefore, it is appropriate to translate the proposed mark into English because MAGNESITA translates to magnesite or magnesia from Portuguese and Spanish, which are considered modern languages.

CONCLUSION

The proposed mark, MAGNESITA, means magnesite or magnesia in English. The examining attorney has demonstrated that magnesite or magnesia is a common component in refractory products which are the applicant's goods. As such the proposed mark is generic for the applicant's goods and the related information services regarding such products.

Furthermore, even if the proposed mark is not considered generic for the applicant's goods and services, the applicant has not met the burden of showing the mark has acquired distinctiveness under Section 2(f) because the evidence submitted is insufficient. The examining attorney respectfully requests that the Board affirm the refusal to register the proposed mark under Section 2(e)(1).

Respectfully submitted,

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BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

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IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

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APPLICANT'S REPLY BRIEF

Commissioner for Trademarks
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APPLICANT'S REPLY BRIEF
U.S. Application No. 85834316

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ARGUMENT

Applicant Magnesita Refractories Company respectfully submits the following reply brief in response to the Examining Attorney's Appeal Brief dated November 19, 2015, which suggests that applicant's claim of acquired distinctiveness under Section 2(f) is insufficient and even if the "evidence is substantial and sufficient enough to support a Section 2(f) claim of acquired distinctiveness," "the Section 2(f) claim fails because the proposed mark is generic as applied to the applicant's goods." Applicant respectfully disagrees with the Examining Attorney's conclusions since the Examining Attorney has improperly weighed the significance of Applicant's evidence of acquired distinctiveness and misinterprets Applicant's goods and services, the relevant public, and components of refractory products and services in determining the genericness of the mark.

A. THE EXAMINING ATTORNEY HAS BASED THE INSUFFICIENCY OF THE SECTION 2(F) CLAIM ON A MISUNDERSTANDING OF APPLICANT'S GOODS AND SERVICES

The Examining Attorney on pages 3-5 of the Examining Attorney's Appeal Brief suggests that the Section 2(f) claim is insufficient "[d]ue to the highly descriptive nature of the proposed mark, MAGNESITA." Applicant, however, submits that the purchasing public would have understood that the mark "MAGNESITA" is not highly descriptive of Applicant's goods and services, but is at most merely descriptive and, therefore, the Director should accept as *prima facie* evidence that the mark has become distinctive with proof of substantially exclusive and continuous use for more than five years.

Specifically, the Examining Attorney fails to appreciate that the amount and character of such evidence depends on the facts of each case, which necessarily varies, depending upon the degree of descriptiveness involved, and becomes progressively greater as the descriptiveness of the term increases. *See In re Mine Safety Appliances Co.*, 66 U.S.P.Q.2d 1694 * 3 (TTAB 2002) (non-precedential) (*citing Yamaha Int'l Corp. v. Hoshino Gakki Co.*, 840 F.2d 1572, 6 USPQ2d 1001, 1008 (Fed. Cir. 1988)); *In re Whitetail Inst. Of North America, Inc.*, 2014 WL 1390517 * 2 (TTAB 2014) (non-precedential).

Instead of merely concluding that the proposed mark is "highly descriptive," as suggested by the Examining Attorney on page 4 of the Examining Attorney's Appeal Brief, Applicant submits that the Examining Attorney erred by not establishing whether the mark is highly descriptive by initially determining whether the mark immediately tells prospective customers about the features of the applicant's goods and services, and then whether the record has a sufficient number of references to establish that the mark is highly descriptive. *See In re Greek Gourmet, Inc.*, 2000 WL 1720159 * 2 (TTAB 2000) (non-precedential); *see also In re the Kyjen Company, Inc.*, 2012 WL 1424429 * 6 (TTAB 2012) (non-precedential), *In re Whitetail Inst. Of North America, Inc.*, 2014 WL 1390517 * 3.

In this case, the Examining Attorney has not provided the necessary evidence to establish that the mark "MAGNESITA" is highly descriptive of Applicant's goods and services by immediately telling prospective customers about the features of Applicant's goods and services, as evidenced by a sufficient number of references, but is instead improperly narrowing Applicant's goods and services to refractory products and services related to magnesite and magnesia.

For example, the category of goods and services at issue is refractory products and information services, where the goods are "refractory products not primarily of metal, namely, refractory bricks, refractory mixes for patching, lining or repairing high temperature apparatus and repairing the lining for furnaces, refractory furnace patching and repair mixes; and pre-cast refractory shapes," while the services are "providing information via a global computer network on the use of refractory products to construct, maintain and repair refractory apparatus using refractory products; and providing information via a global computer network on the use of mechanical equipment and computer models to construct, maintain and repair refractory installations."

As evidenced by a third party website excerpt about Applicant, "The Company benefits from some of the largest and highest quality reserves of dolomite, magnesite, and talc in the word. Magnesita also has other mineral deposits, including chromite and several clays through Brazil. The Company is able to use 80% (by volume) of its own raw materials in the production of refractories." *See* page 6 of the Final Office Action in the TSDR dated November 10, 2014. Further, the types of products Applicant produces include: 1) Bricks and Shapes of: Alumina, Alumina Mag Carbon/Mag, Alumina Carbon, Alumina Silicon Carbide, Bottom Pour, Doloma/Magnesia Doloma- fired and cured, Magnesia Carbon, Magnesia Chrome, Magnesia Spinel, and Pre-cast and –basic and alumina and 2) Bulk Refractories of: Castables – basic and alumina, Coatings, Dry Vibratables, Gunning Mixes, Mortars, Plastics, Ramming Mix, and Taphole Mix (at page 7 of the Final Office Action in the TSDR dated November 10, 2014). In other words, Applicant submits that the prospective customers would understand that Applicant's goods and services are related to various products and services having at least alumina, carbon, silicon, and magnesia.

On the other hand, the Examining Attorney has only provided evidence that the English translation of "MAGNESITA" is "magnesite" or "magnesia" and that magnesite and magnesia can be one of several components in refractory products and that one use of magnesia and magnesite is for refractory products. For example, while the Examining Attorney has established magnesia can be used as a component of the goods sold on various websites, e.g. refractory brick, lining, etc., the Examining Attorney has also established that other materials can be used for such refractory products. For instance, as seen in the printed web-page for Vitcas provided by the Examining Attorney on July 13, 2015, the refractory mortars are high alumina refractories, e.g., 44-88% Al_2O_3 with varying concentrations of iron oxide, Fe_2O_3 (at pages 7-9 of the Request for Reconsideration Denied in the TSDR). Similarly, as seen in the printed web-page for Zircoa, the refractory backup primarily includes custom granular Zirconium Oxide in unstabilized (pure) form or stabilized (combined) with yttrium oxide, magnesium oxide, or calcium oxide for structural stability (at page 14 of the Request for Reconsideration Denied in the TSDR). Additionally, while the Examining Attorney has provided evidence that magnesite and magnesia can be used for refractories, the Examining Attorney has also established that magnesite and magnesia can also be used for polycrystalline ceramics, electrical insulation, pharmaceuticals and cosmetics, paper manufacture, etc. (at pages 6-7 of the Office action dated March 26, 2014). In other words, the purchasing public would understand that while magnesite or magnesia can be used in refractory products, not only can magnesite and magnesia be used for other purposes, the refractory products themselves are not necessarily composed of magnesite or magnesia, but can instead be primarily composed of alumina, silica, or zirconium.

In fact, the Examining Attorney has not provided any evidence that magnesite, magnesia, or the mark "MAGNESITA" would immediately tell prospective customers that Applicant's goods and services are related to "refractory products not primarily of metal, namely, refractory bricks, refractory mixes for patching, lining or repairing high temperature apparatus and repairing the lining for furnaces, refractory furnace patching and repair mixes; and pre-cast refractory shapes," and "providing information via a global computer network on the use of refractory products to construct, maintain and repair refractory apparatus using refractory products; and providing information via a global computer network on the use of mechanical equipment and computer models to construct, maintain and repair refractory installations," respectively. Rather, as evidenced by the declaration filed May 6, 2015, Applicant has not found any instance where the mark "MAGNESITA" was used to describe the refractory product, but rather, only observed the generic terms "castable refractories," "precast refractory shapes," "mortar," "castable," "fire brick," and "refractory brick" as being used to describe the refractory products and information services. *See In re Greek Gourmet, Inc.*, 2000 WL 1720159 * 2 (non-precedential) ("Thus, if it were the case that the mark GREEK GOURMET was highly descriptive, if not generic, as contended by the Examining Attorney, then it is hard to understand how there were fewer than 70 references to this term during a time span of nearly 30 years. The most plausible answer is that this term is not highly descriptive, but rather is, as contended by applicant, simply merely descriptive.")

Therefore, Applicant submits that since the Examining Attorney has not provided any evidence that the terms magnesia, and magnesite, let alone the mark "MAGNESITA" have been used by anyone, let alone, by competitors, to immediately describe to prospective customers refractory products and information services, the mark "MAGNESITA" cannot be highly descriptive of the recited products or services, and is at most merely descriptive.

In view of the merely descriptive nature of the mark "MAGNESITA," Applicant submits that the Examining Attorney erred in suggesting that the Section 2(f) claim of acquired distinctiveness is insufficient, since the Examining Attorney should have accepted as *prima facie* evidence that the mark has become distinctive with proof of substantially exclusive and continuous use.

Specifically, the Examining Attorney should have accepted the declarations filed September 23, 2014 and May 6, 2015 as *prima facie* evidence that the mark has acquired distinctiveness based on, at least, the more than five years of exclusive and continuous use of the mark "MAGNESITA." The Declaration of Gross Sales establishes that the mark "MAGNESITA" has been used in association with the sale of refractory products in excess of US $103,000,000 in 2010, in excess of US $200,000,000 in 2011, in excess of US $200,000,000 in 2012, in excess of US $230,000,000 in 2013, and in excess of $220,000,000 in 2014. Moreover, Applicant has exclusively and continuously used the mark "MAGNESITA" in commerce since 2008. That is, Applicant has almost sold 1 billion dollars of refractory products during this period under the mark "MAGNESITA," which clearly establishes that the mark "MAGNESITA" indicates that Applicant is the source of the goods and services.

Therefore, similar to this Board's holding in *In re J.T. Posey Co.*, where the Board held that "in view of the facts that (i) there is no dictionary definition for "skin sleeve," (ii) with numerous competitors in the field of medical protective fabric skin coverings for wound prevention, there is vague evidence in a website advertisement of only one competitor using the term, and (iii) there are only three academic articles referencing the term "skin sleeves," we find that SKINSLEEVES is not so highly descriptive that its registrability under Section 2(f) may not be determined on the basis of Applicant's declaration of substantially exclusive and continuous use since 2004," this Board should hold that since there is no evidence that the terms magnesite, magnesia, let along the mark "MAGNESITA" is used to describe refractory products or services even in view of the numerous competitors in the field, Applicant's declaration of substantially exclusive and continuous use should allow registrability under Section 2(f). *In re J.T. Posey Co.*, 2015 WL 5170955 * 14 (TTAB 2015) (non-precedential).

For at least this reason, Applicant submits that the Examining Attorney has improperly weighed the evidence for the claim of acquired distinctiveness to determine Applicant's claim of acquired distinctiveness as being insufficient, and the reversal of the Examining Attorney's refusal is requested.

B. THE EXAMINING ATTORNEY ERRED IN DETERMINING GENERICNESS OF THE MARK BY MISCHARACTERIZING THE RELEVANT PUBLIC.

The Examining Attorney on page 6 of the Examining Attorney's Appeal Brief maintains the erroneous characterizing of the relevant public as only large-scale industrial consumers. Specifically, the Examining Attorney points to the article submitted by the Applicant that Magnesita controls 70% of the steel refractories market and 80% of the cement refractories market and the fact that the quantity of sales of the refractory product is in "metric tons."

As discussed by the Court of Appeals for the Federal Circuit ("CAFC"), however, the relevant public is limited to actual or potential purchasers of the goods or services. *Magic Wand, Inc. v. RDB, Inc.*, 940 F.2d 638, 641 (Fed. Cir. 1991). In making this determination, the TTAB should look at the identification of goods to determine the potential or actual customers. *Id.* at 641.

In so doing, instead of relying on Applicant's business and sales, the Examining Attorney still continues to err in making its genericness determination by not relying on the definition of goods and services of the present application to determine the actual or potential customers of the identified goods. Applicant submits that since the relevant public for a genericness determination is the ***actual or potential purchaser*** of the goods or services, the relevant public in this case is any actual or potential purchaser of refractory products or information services, which in this case is the general public. *See Magic Wand, Inc*., 940 F.2d at 641. As is clear from the plain reading of the identification of goods in Class 19 "refractory products not primarily of metal, namely, refractory bricks, refractory mixes for patching, lining or repairing high temperature apparatus and repairing the lining for furnaces, refractory furnace patching and repair mixes; and pre-cast refractory shapes" and services in Class 37 "providing information via a global computer network on the use of refractory products to construct, maintain and repair refractory apparatus using refractory products; and providing information via a global computer network on the use of mechanical equipment and computer models to construct, maintain and repair refractory installations," the refractory products and information services are not limited to a particular group of customers, but to ***any actual or potential purchaser.*** In other words, since any doubt on the issue of genericness is resolved in favor of the applicant, the relevant public in this genericness determination is the general public, because the general public actually or potentially purchases the refractory products and information services. *See In re Interfashion U.S.A., Inc.*, 2006 WL 3147914 * 3 (TTAB 2006).

C. THE EXAMINING ATTORNEY INCORRECTLY MISCHARACTERIZES APPLICANT'S GOODS AND SERVICES IN MAKING A GENERICNESS DETERMINATION

The Examining Attorney on page 7 of the Examining Attorney's Appeal Brief suggests that the name of an ingredient, a key aspect, a central focus or feature, or a main characteristic of goods and/or services may be generic for those goods and services. The Examining Attorney then suggests that since different chemical dictionaries suggest that the primary use of the goods are for metallurgical furnace products, "it is clear that applicant's proposed mark is generic for applicant's refractory goods and services."

Even assuming, but not admitting, that the relevant public is in fact large industrial consumers, as suggested by the Examining Attorney, Applicant submits that in determining the second step of the genericness determination, the court must determine whether members of the relevant public primarily use or understand the term sought to be protected to refer to the genus of goods or services in question. *See H. Marvin Ginn Corp. v. Int'l Ass'n of Fire Chiefs, Inc.*, 782 F.2d 987, 990, 228 U.S.P.Q. 528 (Fed. Cir. 1986); *see also* TMEP § 1209.01(c).

As an initial matter, Applicant submits that the Examining Attorney has not established that magnesia or magnesite, let alone the mark "MAGNESITA," is a primary component in all refractory products or that magnesia or magnesite is only used as refractory products. Rather, as clearly seen in the evidence of record, refractory products can be made from a number of different materials, including calcia, yttria, magnesia, silica, and alumina. For instance, as seen in the printed web-page for Vitcas provided by the Examining Attorney on July 13, 2015, the refractory mortars are high alumina refractories, e.g., 44-88% Al_2O_3 with varying concentrations of iron oxide, Fe_2O_3 (at pages 7-8 of the Request for Reconsideration Denied in the TSDR). Similarly, as seen in the printed web-page for Zircoa, the refractory backup primarily includes custom granular Zirconium Oxide in unstabilized (pure) form or stabilized (combined) with yttrium oxide, magnesium oxide, or calcium oxide for structural stability (at pages 14-16 of the Request for Reconsideration Denied in the TSDR). Additionally, while the Examining Attorney has provided evidence that magnesite and magnesia can be used for refractories, the Examining Attorney has also established that magnesite and magnesia can also be used for polycrystalline ceramics, electrical insulation, pharmaceuticals and cosmetics, paper manufacture, etc. (at pages 6-7 of the Office Action dated March 26, 2014).

Moreover, Applicant submits that Applicant's products include: 1) Bricks and Shapes of: Alumina, Alumina Mag Carbon/Mag, Alumina Carbon, Alumina Silicon Carbide, Bottom Pour, Doloma/Magnesia Doloma- fired and cured, Magnesia Carbon, Magnesia Chrome, Magnesia Spinel, and Pre-cast and –basic and alumina and 2) Bulk Refractories of: Castables – basic and alumina, Coatings, Dry Vibratables, Gunning Mixes, Mortars, Plastics, Ramming Mix, and Taphole Mix (page 7 of the Final Office Action in the TSDR dated November 10, 2014).

That is, while the name of an ingredient, a key aspect, a central focus or feature, or a main characteristic of goods and/or services may be generic, in this case, the Examining Attorney has failed to establish that magnesite, magnesia, or let alone the mark "MAGNESITA" is a key component in refractory products, let alone, a key component in Applicant's goods and services in the present application.

Nevertheless, Applicant submits that the test for genericness is not whether any ingredient may be generic for the goods and services, but rather, whether the relevant public would *primarily* use or understand the term sought to be protected to refer to the genus of goods and services in question. *See H. Marvin Ginn Corp.*, 782 F.2d at 991.

In this case, Applicant submits that the Examining Attorney has not provided record evidence that establishes that magnesite, magnesia, or the term "MAGNESITA" is used by the relevant public to *primarily refer* to the class of refractory products and information services claimed by Applicant. Rather, the Examining Attorney only predominantly relies on the fact that since magnesia or magnesite is used in refractory products, "it is clear that magnesite or magnesia is an important component in refractory products" to determine that the mark "MAGNESITA" is generic. As discussed above, however, the relevant public would have understood that refractory products are not limited to only products containing magnesite or magnesia, but also include different materials, including calcia, yttria, silica, and alumina. In so doing, Applicant argued on page 14 of the Applicant's Brief of September 21, 2015 that the relevant public uses the terms "castable refractories," "precast refractory shapes," "mortar," "castable," "fire brick," and "refractory brick" as the generic terms for various refractory products and information services, but does not use magnesite, magnesia, or the mark "MAGNESITA" to refer to such refractory products, which the Examining Attorney disregards and does not take into account. For example, Allied Mineral Products refers to its products as "refractory products," "castable refractories," and "precast refractory shapes." (Dec. ¶ 4) (Declaration filed with the Request for Reconsideration of May 6, 2015). Similarly, BNZ Materials, Inc. uses the generic term "insulating firebrick, (Dec. ¶

7), while Fire Brick Engineers Company uses the generic terms "refractory products" and "fire brick." (Dec. ¶ 12).

In other words, while the Examining Attorney has established that other competitors use magnesite or magnesia as an ingredient or component, in some of their refractory products, the Examining Attorney has not provided any evidence that the relevant public, let alone competitors, use magnesite, magnesia, or the mark "MAGNESITA" to *primarily refer* to any of the competitors' refractory products or services. *See In re Minnetonka, Inc.*, 3 USPQ2d 1711, 1987 WL 124303 * 3 (TTAB 1987) ("This body of evidence is persuasive, and the Examining Attorney does not claim otherwise, to show that there exists a fairly substantial number of competitors in the business of selling liquid hand soap; that none of these competitors uses the term 'soft soap' descriptively, generically or otherwise in connection with its product.")

In fact, the Examining Attorney is failing to appreciate that Applicant's goods and services are not magnesia or magnesite, but rather the goods are "refractory products not made primarily of metal" and services for "providing information via a global computer network on the use of refractory products," where magnesite is a compound in Class 1 and not in Class 19 or 37.

That is, Applicant does not observe the necessary clear evidence that establishes that the relevant public uses or understands the terms magnesia and magnesite, let alone the term "MAGNESITA," to *primarily refer* to the refractory brick or lining, i.e., the record lacks clear evidence that shows that the terms magnesia, magnesite, or "MAGNESITA" are generic and *primarily refer* to the refractory brick or lining being sold.

Since the Examining Attorney has failed to establish by clear evidence that the mark "MAGNESITA" is generic for the identified goods and services, the reversal of the Examining Attorney's genericness determination is requested.

CONCLUSION

Applicant respectfully submits that the application should be approved for registration on the Principal Register because the mark "MAGNESITA" is not generic for the recited goods in the present application and has acquired distinctiveness. Applicant respectfully requests that this Board reverse the refusal of registration.

Respectfully submitted,

/Thomas J. Moore/

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This Opinion is not a
Precedent of the TTAB

Hearing: March 15, 2016 Mailed: May 17, 2016

UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re Magnesita Refractories Company

Serial Nos. 77873477, 85834316[1]

Thomas J. Moore of Bacon & Thomas PLLC,
for Magnesita Refractories Company.

Dawn Feldman Lehker, Trademark Examining Attorney, Law Office 111,
Robert L. Lorenzo, Managing Attorney.

Before Quinn, Kuhlke and Lykos,
Administrative Trademark Judges.

Opinion by Kuhlke, Administrative Trademark Judge:

Magnesita Refractories Company ("Applicant") seeks registration of the word MAGNESITA as a standard character mark.

Application Serial No. 77873477

In Application Serial No. 77873477, Applicant seeks to register the applied-for matter for:

[1] In view of the common issues present in these appeals, the appeals were consolidated for the hearing and the Board is deciding them in this single decision. Citations to the record and briefs are to Application Serial No. 77873477 unless otherwise noted.

> Refractory products not made primarily of metal, namely, refractory bricks, refractory mixes for patching, lining or repairing high temperature apparatus and repairing the lining for furnaces, refractory furnace patching and repair mixes, in International Class 19; and
>
> Providing information via a global computer network on constructing, maintaining, and repairing refractory apparatus using refractory products, in International Class 37.

The Application was filed on November 19, 2009 under Section 1(b) of the Trademark Act based on a *bona fide* intention to use the applied-for matter in commerce. The Application includes the following translation statement: The English translation of "MAGNESITA" is "magnesia" or "magnesite."

The Examining Attorney refused registration under Section 2(e)(1) of the Trademark Act, 15 U.S.C. §1052(e)(1), on the ground that the applied-for matter is merely descriptive of Applicant's goods and services. After the Examining Attorney issued a final refusal, on June 13, 2011, Applicant filed an Amendment to Allege Use and a Request for Reconsideration. In addition, on September 30, 2013, Applicant amended its application to seek registration under Section 2(f), 15 U.S.C. § 1052(f), based on acquired distinctiveness. The Examining Attorney continued to refuse registration based on mere descriptiveness under Section 2(e)(1), indicating the showing under Section 2(f) was insufficient. On March 29, 2014, Applicant filed a Request for Reconsideration and an amendment to the Supplemental Register. The Examining Attorney accepted the amendment to the Supplemental Register for the services in International Class 37, but refused registration on the Supplemental Register for the goods in International Class 19 under Section 23(c), 15 U.S.C. §

1091(c), of the Trademark Act on the ground that MAGNESITA is generic for those goods.

Thus, the only issue remaining for determination by the Board in Application Serial No. 77873477 is whether MAGNESITA is generic for the goods listed in Class 19 and therefore unregistrable on the Supplemental Register.[2]

Application Serial No. 85834316

In Application Serial No. 85834316, Applicant seeks to register the applied-for matter for:

> refractory products not primarily of metal, namely, refractory bricks, refractory mixes for patching, lining or repairing high temperature apparatus and repairing the lining for furnaces, refractory furnace patching and repair mixes; and pre-cast refractory shapes, in International Class 19; and
>
> providing information via a global computer network on the use of refractory products to construct, maintain and repair refractory apparatus using refractory products; and providing information via a global computer network on the use of mechanical equipment and computer models to construct, maintain and repair refractory installations, in International Class 37.

This application was filed on January 28, 2013, under Section 1(a) of the Trademark Act based on an allegation of first use and use in commerce on October 1, 2010. During prosecution of the application Applicant amended its date of first use to October, 2008. The Application includes the following translation statement: The

[2] Regardless of the outcome of this decision, Applicant's services in Application Serial No. 77873477 in International Class 37 will go forward for registration on the Supplemental Register.

English translation of “MAGNESITA” in the mark is “MAGNESITE” or “MAGNESIA.”

The Trademark Examining Attorney initially refused registration of Applicant’s applied-for matter under Section 2(e)(1) of the Trademark Act, 15 U.S.C. § 1052(e)(1), on the ground that Applicant’s applied-for matter is merely descriptive for the goods and services. In response to the refusal Applicant asserted acquired distinctiveness under Section 2(f). The Examining Attorney continued the refusal of mere descriptiveness, asserting that the applied-for matter is highly descriptive and the Section 2(f) showing was insufficient. In the November 10, 2014 Office action, the Examining Attorney refused registration as to the goods in Class 19 on the ground that the applied-for matter is generic or highly descriptive for such goods and as to the services in Class 37 that the applied-for matter is highly descriptive and the showing under Section 2(f) is insufficient to establish acquired distinctiveness.

Thus, the remaining issues for the Board to determine in Application Serial No. 85834316 are (1) whether MAGNESITA is generic for the goods in Class 19 or in the alternative merely descriptive and the 2(f) showing is insufficient, and (2) whether MAGNESITA is merely descriptive for the services in Class 37 and the 2(f) showing is insufficient.

When the refusals in both applications were made final, Applicant appealed and requested reconsideration. After the Examining Attorney denied the requests for reconsideration, the appeals were resumed and briefs were filed. We affirm the refusals to register.

Standard of review

As a preliminary matter, Applicant argues that the Board's "standard of review should be reconsidered in view of the Supreme Court's decision the case *B&B Hardware, Inc. v. Hargis Industries, Inc.*, [135 S. Ct. 1293, 113 USPQ2d 204 (2015)]," and that the burden of persuasion should be on the Examining Attorney. 9 TTABVUE 14 (App. Serial No. 85834316). We first point out that this is an *ex parte* appeal not *inter partes* litigation, which was the subject matter of the Court's decision in *B&B Hardware v. Hargis*. *See In re Cordua Restaurants, Inc.*, ___ F.3d ___, ___ USPQ2d ___ n.2 (Fed. Cir. May 13, 2016) ("The [Supreme] Court held that issue preclusion did apply to a TTAB decision in an *inter partes* opposition proceeding, noting that the procedures there resembled the procedures of a district court. … But there is no suggestion in *B&B Hardware* that an examiner's decision to register a mark or to refuse registration satisfies the traditional requirements of issue preclusion.").

In any event, the burden always has and continues to fall on the USPTO. It is the burden of the USPTO to establish a *prima facie* case for its refusals, which may be rebutted by an applicant. In the case of establishing genericness, the United States Patent and Trademark Office (USPTO) has the burden of establishing by clear evidence that a mark is generic and, thus, unregistrable. *In re Hotels.com*, 573 F.3d 1300, 91 USPQ2d 1532, 1533 (Fed. Cir. 2009). In the case of establishing acquired distinctiveness, the burden again falls on the USPTO to establish that the applied-for matter is merely descriptive, unless conceded by an applicant by not preserving its arguments based on inherent distinctiveness when amending to assert acquired distinctiveness. *In re Pacer Technology*, 338 F.3d 1348, 67 USPQ2d 1629, 1630 (Fed. Cir. 2007) ("It is well established that the PTO has the burden to establish a *prima facie* case of no inherent distinctiveness."). Further, "[o]nce the PTO sets forth a sufficient *prima facie* case, the burden shifts to the applicant to come forward with evidence to rebut the *prima facie* case." *Id.* at 1631. If an applicant rebuts a mere descriptiveness refusal by seeking registration based on acquired distinctiveness, it is applicant's burden to establish a *prima facie* case of acquired distinctiveness. *See Yamaha International Corp. v. Hoshino Gakki Co. Ltd.*, 840 F.2d 1572, 6 USPQ2d 1001 (Fed. Cir. 1988). Applicant does not point to any language in the *B & B Hardware* decision or elsewhere that shifts the burden of persuasion on the issue of acquired distinctiveness in an *ex parte* appeal from Applicant to the Examining Attorney. We observe that because acquired distinctiveness serves as a rebuttal to a mere descriptiveness refusal, the burden appropriately resides with Applicant. As a result, we find that it remains Applicant's burden of demonstrating that a proposed mark has acquired distinctiveness under Section 2(f).[3] *Yamaha*, 6 USPQ2d at 1001.

Is MAGNESITA generic for the applied-for goods?

A generic term "is the common descriptive name of a class of goods or services." *Princeton Vanguard, LLC v. Frito-Lay N. Am., Inc.*, 786 F.3d 960, 114 USPQ2d 1827, 1830 (Fed. Cir. 2015) (quoting *H. Marvin Ginn Corp. v. Int'l Ass'n of Fire Chiefs, Inc.*,

[3] We further observe that acquired distinctiveness of a designation under Section 2(f) is not a "static target," and an adverse decision by the Board on the issue of acquired distinctiveness does not preclude an applicant from the opportunity to later show that its proposed mark has acquired distinctiveness under Section 2(f) at a future date on a different record.

782 F.2d 987, 228 USPQ 528, 530 (Fed. Cir. 1986)). Because generic terms "are by definition incapable of indicating a particular source of the goods or services," they cannot be registered as trademarks. *Id.* (quoting *In re Dial-A-Mattress Operating Corp.*, 240 F.3d 1341, 57 USPQ2d 1807, 1810 (Fed. Cir. 2001)). "The critical issue in genericness cases is whether members of the relevant public primarily use or understand the term sought to be protected to refer to the genus of goods or services in question." *Id.* (quoting *Marvin Ginn*, 228 USPQ at 530). Making this determination "involves a two-step inquiry: First, what is the genus of goods or services at issue? Second, is the term sought to be registered … understood by the relevant public primarily to refer to that genus of goods or services?" *Marvin Ginn*, 228 USPQ at 530. *See also Princeton Vanguard*, 114 USPQ2d at 1829 ("there is only one legal standard for genericness: the two-part test set forth in *Marvin Ginn*"). "An inquiry into the public's understanding of a mark requires consideration of the mark as a whole." *Id.* at 1831 (quoting *In re Steelbuilding.com*, 415 F.3d 1293, 75 USPQ2d 1420, 1421 (Fed. Cir. 2005)). Competent sources to show the relevant purchasing public's understanding of a contested term include purchaser testimony, consumer surveys, dictionary definitions, trade journals, newspapers and other publications. *Id.* at 1830; *In re Bed & Breakfast Registry*, 791 F.2d 157, 229 USPQ 818, 819 (Fed. Cir. 1986).

In an *ex parte* appeal, as noted above the USPTO must establish by clear evidence that a mark is generic and, thus, unregistrable. *In re Hotels.com*, 91 USPQ2d at 1533; *In re Gould Paper Corp.*, 834 F.2d 1017, 5 USPQ2d 1110, 1111 (Fed. Cir. 1987); *In re Merrill Lynch, Pierce, Fenner and Smith, Inc.*, 828 F.2d 1567, 4 USPQ2d 1141 (Fed.

Cir. 1987). "Doubt on the issue of genericness is resolved in favor of the applicant." *In re DNI Holdings Ltd.*, 77 USPQ2d 1432, 1437 (TTAB 2005).

We begin by finding that the genus at issue in this case is adequately defined by Applicant's identification of goods, "Refractory products not made primarily of metal, namely, refractory bricks, refractory mixes for patching, lining or repairing high temperature apparatus and repairing the lining for furnaces, refractory furnace patching and repair mixes"; "and pre-cast refractory shapes" ("refractory products"). *See Magic Wand Inc. v. RDB Inc.*, 940 F.2d 638, 19 USPQ2d 1551, 1552 (Fed. Cir. 1991) ("[A] proper genericness inquiry focuses on the description of [goods or] services set forth in the [application or] certificate of registration"). We further find that the "relevant public" consists of the public at large, namely, ordinary consumers who purchase such refractory products, which, as the record shows, ranges from retail purchasers of household products to industrial purchasers for commercial operations. We note that the record evidence reveals that Applicant's customers are industrial operators, although the identification of goods is not so limited.

We turn then to determine whether MAGNESITA is understood by the relevant purchasing public as primarily referring to refractory products. In starting our analysis, we note that the foreign equivalent of a generic English term is no more registrable than the English term itself. "Under the doctrine of foreign equivalents, foreign words from common languages are translated into English to determine genericness, descriptiveness, as well as similarity of connotation in order to ascertain confusing similarity with English word marks." *Palm Bay Imps. Inc. v. Veuve Clicquot*

Ponsardin Maison Fondee En 1772, 396 F.3d 1369, 73 USPQ2d 1689, 1696 (Fed. Cir. 2005) (citations omitted); *In re Sambado & Son Inc.*, 45 USPQ2d 1312, 1315 (TTAB 1997) (FRUTTA FRESCA is equivalent to "fresh fruit" and thus generic and unregistrable for goods including "fresh fruits"). *See also Cordua Rests., Inc.*, ___ USPQ2d ___. The doctrine is not an absolute rule, however, and is subject to several limitations. It does not apply to words from dead or obscure languages, *In re Spirits Int'l N.V.*, 563 F.3d 1347, 90 USPQ2d 1489, 1491 (Fed. Cir. 2009) (citing 2 J. Thomas McCarthy, MCCARTHY ON TRADEMARKS AND UNFAIR COMPETITION § 11:34 (4th ed. 2009)), and caution is indicated when the foreign term and the English to which it is compared are not exact synonyms, *In re Sarkli, Ltd.*, 721 F.2d 353, 220 USPQ 111, 113 (Fed. Cir. 1983). As a general principle, the doctrine of foreign equivalents is limited to situations in which an American consumer is likely to "stop and translate" the foreign words into their English equivalent. *Palm Bay*, 73 USPQ2d at 1696 (quoting *In re Pan Tex Hotel Corp.*, 190 USPQ 109, 110 (TTAB 1976). The ordinary American purchaser includes "all American purchasers, including those proficient in a non-English language who would ordinarily be expected to translate words into English." *In re Spirits Int'l, N.V.*, 90 USPQ2d at 1492.

The record includes translations for MAGNESITA from three languages. In Italian the English equivalent is MAGNESIA. In Spanish and Portuguese the English equivalent is MAGNESITE.[4]

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[4] March 18, 2010 Response p. 1. *See also* A PORTUGUESE-ENGLISH DICTIONARY (1958) March 27, 2014 Office action p. 23; Spanish Dictionary (www.spanishdict.com) February 27, 2013 Office action p. 2 (App. Serial No. 85834316).

We find it appropriate to apply the doctrine of foreign equivalents in this case. There is no evidence of record suggesting that the translation in this application is inaccurate, that MAGNESITA is so obscure it would not be easily recognized and translated by Spanish, Portuguese or Italian speakers in the U.S. marketplace, or that it is an idiom which is not equivalent to its direct English translation. Also, there can be no doubt that Spanish, Portuguese and Italian are common, modern languages.[5] *See Cordua Rests., Inc.*, ___ USPQ2d ___ ("Because 'churrasco' is a common word in Spanish and Portuguese and because the '191 Application itself concedes that 'churrascos' means 'barbecue,' the PTO would have been justified in translating 'churrascos' into 'barbecue' and subsequently determining whether the term 'barbecue' is generic when applied to restaurant services."). Purchasers of refractory products familiar with Spanish, Portuguese or Italian are likely to "stop and translate" MAGNESITA when encountering it used in connection with refractory products. We, therefore, find Applicant's mark to be equivalent to the English words "magnesite" and "magnesia" for purposes of determining genericness.

Applicant is described on its website as follows:

> Magnesita is the most integrated refractory industry in the world … Over 70% of the raw material used in production is taken from its own mines.[6]

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[5] Spanish is widely spoken in the United States. See Spanish.about.com ("a new analysis of information gathered during the 2000 U.S. Census shows that nearly one out of five Americans speak a language other than English at home - and the vast majority of them speak Spanish."). November 5, 2010 Office action p. 8-9 and www.wikipedia.org ("Spanish is the second most-common language in the United States after English.") *Id*. at 11.

[6] February 22, 2013 Response p. 2.

In addition, the Examining Attorney submitted an excerpt from The Refractories Institute that includes the following information about Applicant:

> Magnesita Refratários S.A. … is a vertically integrated refractory producer supplying the steel, cement and various other industries. In addition, the Company exports some of its raw materials, DBM (Dead Burned Magnesia), and refractories to a wide range of countries. … The Company benefits from some of the largest and highest quality reserves of dolomite, magnesite and talc in the world. … Types of Products: Bricks and Shapes: … Magnesia Carbon, Magnesia Chrome, Magnesia Spinel[7]

The record includes the following definitions, descriptions of and use for "magnesite" and "magnesia":

> Magnesite: a mineral $MgCO_3$ that consists of magnesium carbonate, that is isomorphous with siderite and calcite, and that is used chiefly in making refractories and magnesia;[8]
>
> Magnesite uses include: refractory bricks, cement;[9]
>
> Magnesite – Magnesium Carbonate $MgCO_3$ … Uses … Dead-burned magnesia –DBM Sinter magnesia Basic refractories … Magnesium chloride - Cement Ceramics and refractories;[10]
>
> Peter W. Harben, Inc. showing magnesite and magnesia as a mineral used for refractories;[11]
>
> Similar to the production of lime, magnesite can be burned in the presence of charcoal to produce MgO, otherwise

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[7] February 27, 2013 Office action pp. 12-13 (App. Serial No. 85834316).

[8] MERRIAM-WEBSTER UNABRIDGED DICTIONARY (2014), June 4, 2014 Response p. 2 (App. Serial No. 85834316).

[9] geology.com March 30, 2010 Office Action p. 2.

[10] mineralszone.com March 30, 2010 Office action at 6-8.

[11] peterharben.com March 30, 2010 Office action at 9.

known as periclase. Such periclase is an important product in refractory materials;[12]

Magnesite – noun a mineral, magnesium carbonate, $MgCO_3$, having a characteristic conchoidal fracture and usually occurring in white masses.;[13]

Magnesite is used as a refractory material, a catalyst and filler in the production of synthetic rubber, and a material in the preparation of magnesium chemicals and fertilizers;[14]

When heated to 1400-1500 ˚C, pure magnesite will be "dead burnt," containing less than 0.5% carbon dioxide. This is used as a refractory in the metallurgical industry;[15]

The Clay Brick & Product Manufacturing industry comprises establishments primarily engaged in manufacturing … fabricated nonclay refractories such as graphite, magnesite, silica, or alumina crucibles … ;[16]

What is Magnesia? Magnesia is a term used to describe various products from magnesium-rich sources. … The two most important magnesium minerals are magnesite ($MgCO_3$) and brucite ($Mv(OH)_2$). Magnesite is the most common source of magnesia and serves many important industrial applications. … The two most commercially important magnesia products are dead-burned magnesia and caustic-calcined magnesia. … Dead-burned magnesia, also known as refractory magnesia, is produced from the heating of magnesite or magnesium hydroxide and is the primary component in refractory materials. The refractory industry is the greatest consumer of magnesium compounds, overall. Refractory materials are nonmetallic substances which are extremely heat resistant and are of great industrial value as the linings in furnaces, kilns, and

[12] wikipedia.org March 30, 2010 Office action at 15.

[13] Dictionary.reference.com based on RANDOM HOUSE DICTIONARY (2010) November 5, 2010 Office action p. 2.

[14] Dictionary.reference.com November 5, 2010 Office action p. 3.

[15] Proquest (proquest.umi.com) May 27, 2011 Office action p. 4.

[16] Proquest (proquest.umi.com) May 27, 2011 Office action p. 5.

> reactors. The steel industry, for instance, is the largest user of refractory magnesia;[17]
>
> Magnesia. Magnesium oxide that has been specially processed. … magnesite. . … The term magnesite is loosely used as a synonym for magnesia as are also the terms caustic-calcined magnesite, dead-burned magnesite, and synthetic magnesite. … Use: To make the various grades of magnesium oxide, to produce carbon dioxide, refractory. … magnesite, dead-burned … MgO. The granular product obtained by burning (firing) magnesite or other substances convertible to magnesia upon heating above 1450C long enough to form granules suitable for use as a refractory (ASMT). Use: Refractories, as grains or basic brick, the latter especially in open hearth furnaces for steel, furnaces for nonferrous metal smelting, and in cement and other kilns;[18]
>
> Dead-burned magnesia from magnesite, seawater, or well and like brines is used as a principal constituent in metallurgical furnace refractory products;[19]
>
> Magnesite. A white to bluish-gray mineral used in the manufacture of bricks for basic refractory furnace linings and as an ore of magnesium;[20]
>
> Magnesia refractory … Heat- and corrosion-resistant material made of magnesium oxide; used in cement or brick form to line high-temperature process vessels or furnaces;[21]

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[17] Industrial Minerals Association North America (ima-na.org) January 9, 2012 p. 5-6.

[18] HAWLEY'S CONDENSED CHEMICAL DICTIONARY (14th ed. 2001) March 27, 2014 Office action pp. 2-5.

[19] CONCISE ENCYCLOPEDIA OF CHEMICAL TECHNOLOGY VOL. 2 (5th ed. 2007) March 27, 2014 Office action p. 7.

[20] MATERIALS HANDBOOK (14th ed. 1997) March 27, 2014 Office action p. 11.

[21] DICTIONARY OF MATERIALS SCIENCE (2003) March 27, 2014 Office action p. 15.

> The oxides of aluminum (alumina), silicon (silica) and magnesium (magnesia) are the most important materials used in the manufacturing of refractories.[22]

Given its importance as a refractory material it is not surprising to find it used in naming various products. In the following examples "magnesite" and "magnesia" are used in naming a type of brick:

> Magnesia brick … Refractory brick produced from sintering or melting magnesia (s. Magnesia). Additional references: Basic lining Limestone Magnesia-chrome brickMagnesia brickMagnesite massLining … Magnesite mass Refractory mass produced from sintering or melting magnesia (s. Magnesia). Additional references: MagnesiteMagnesia brick, Magnesia-chrome brick Refractory materials Lining;[23]
>
> High grade DBM [dead burned magnesia] and EFM [electro fused magnesia] are used mainly in bricks/shapes to produce the following refractories: Magnesia carbon bricks, magnesia bricks, magnesia chrome bricks, magnesia spinel bricks, magnesia dolomite bricks, magnesia carbon alumina bricks;[24]
>
> RHI Basic bricks … Magnesite bricks RHI's objective is to increase your profitability. We do so by achieving a long service life with a high-quality selection of RHI refractory bricks. The right products to withstand severe conditions in alternative fuel fired cement kilns. … Top-grade magnesia spinel bricks … Magnesia chromite bricks.[25]

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[22] Wikipedia (wikipedia.org) July 18, 2014 Office action p. 10.

[23] Foundry Lexicon (www.giessereilexikon.com) July 18, 2014 Office action pp. 3-4.

[24] ISPAT Guru (ispatguru.com) February 26, 2015 Office action p. 4.

[25] RHI (www.rhi-ag.com) November 10, 2014 Office action p. 2 (App. Serial No. 85834316).

The record also includes examples of other companies using the words "magnesite" or "magnesia" in connection with refractory products:

> Zircoa … Refractory Backup (Thermal Insulation) Extend the life of your furnace, and maintain tighter control over your furnace temperatures with Zircoa's pre-sintered grog refractory backup, Zircoa Backup 1859 –partially stabilized with magnesia and calcia. … Burner blocks are engineered to withstand high temperatures and the contaminants present in fuel oil, while providing the added resistance to corrosion. Either Calcia, Ytria or Magnesia stabilized Zirconium Oxide compositions will satisfy your unique requirements and extend burner block life to more than one year.;[26]
>
> Fire Brick Engineers Company … Refractory Brick Products … Brick by Resco, An American Owned Refractory Company … LadleMax AMG is an 80% alumina brick containing magnesia, antioxidants, and graphite. … This product is recommended for ladle bottoms and barrels of steel shops making aluminum-killed steels. … LadleMax AMG 90 SL is similar to AMG 90, but contains a higher quantity of magnesia for improved slag resistance.;[27]
>
> Minerals Technologies … Ferrocon SGS series, sprayable coating material is a proven performer for tundish wear lining. … It can be sprayed on any refractory surface up to 80˚C, which enables the steelmaker to utilize residual heat … Ferrocon Tundish Boards are designed and manufactured both in magnesite and silica compositions to match specific steel production needs. … FILLMIX 85T is a magnesite based moldable water-free mix for tundish coating.;[28]

[26] Zircoa (www.zircoa.com) February 26, 2015 Office action pp. 7-8.

[27] Fire Brick Engineers (www.firebrickengineers.com) February 26, 2015 Office action pp. 14 15.

[28] Minerals Tech (www.mineralstech.com) February 26, 2015 Office action pp. 18-20.

> Mt. Savage Firebrick … Tech Data Fireclay … Typical Chemical Analysis … Magnesium Oxide (MgO) .89;[29]
>
> Harbison Walker Refractories Company … Guidon … Classification: Burned Fused Grain Magnesite – Chrome Brick;[30]
>
> Plibrico Company LLC … Product Description A high alumina, magnesium aluminate spinel enriched, low cement castable. Vibration cast only.;[31]
>
> Morgan ThermalCeramics … Triangle 95C Magnesia … Description A high purity cast magnesia … Applications Induction melting crucibles for special alloy applications.;[32]
>
> Refractories Dead Burnt Magnesite/Fused Magnesite … This [sic] products are used in: Refractory Industry for manufacture of Basic Refractory Bricks … ;[33]
>
> Grecian Magnesite … New refractory fused magnesia product under the "PyrMag" brand, launched by Grecian Magnesite … for ever demanding, high-end refractory applications. … .[34]

There is no dispute and the record makes clear that magnesite and magnesia are the names of elements used in refractory products, including refractory bricks. Moreover, the record shows magnesite and magnesia are significant aspects of the refractory products. *See Cordua Rests. Inc.*, ___ USPQ2d ___ (quoting 2 McCarthy §12:23) ("A generic name of goods may also be a generic name of the services of selling or designing those goods."); *In re Hask Toiletries, Inc.*, 223 USPQ 1254 (TTAB 1984) (HENNA 'N' PLACENTA for hair conditioner, "designation accurately describes the two key elements of the product to which applied, invests these generic terms with no special or new significance or different commercial impression to support a finding of trademark 'capability'"). Significantly, the record includes examples where magnesite or magnesia are used to name or refer to a type of refractory brick (*e.g.*, magnesite brick, magnesia-chrome brick). Based on this evidence we have no doubt that potential purchasers familiar with Spanish, Portuguese or Italian would understand MAGNESITA to refer, at minimum, to a type of refractory brick, *i.e.*, a magnesite brick. *In re Central Sprinkler Co.*, 49 USPQ2d 1194 (TTAB 1998) (ATTIC generic for sprinklers because consumers would understand it to refer to a category of sprinklers). If the proposed mark is held generic for any of the goods identified in a class of an involved application, registration is properly refused. *See In re Analog Devices, Inc.*, 6 USPQ2d 1808, 1810 (TTAB 1988), *aff'd*, 871 F.2d 1097, 10 USPQ2d 1879 (Fed. Cir. 1989) (unpublished); and *In re Quick-Print Copy Shop, Inc.*, 205 USPQ 505, 507. *See also Cordua, Rests, Inc.*, ___ USPQ2d ___ ("[A] term is generic of the relevant public understands the term to refer to part of the claimed genus of goods or services, even if the public does not understand the term to refer to the broad genus as a whole.").

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[29] Technical Data Sheet February 26, 2015 Office action p. 25.

[30] Technical Data Sheet February 26, 2015 Office action p. 26.

[31] Technical Data Sheet February 26, 2015 Office action p. 27.

[32] Technical Data Sheet February 26, 2015 Office action p. 28.

[33] Hindustan Produce Company (www.hindustanproduceco.com) November 10, 2014 Office action p. 5 (App. Serial No. 85834316).

[34] Grecian Magnesite (www.grecianmagnesite.com) November 10, 2014 Office action p. 8 (App. Serial No. 85834316).

Applicant argues that other names are used for refractory products but that does not make this one less generic because "any term that the relevant public understands to refer to the genus … is generic." *In re 1800Mattress.com IP LLC*, 586

F.3d 1359, 92 USPQ2d 1682, 1685 (Fed. Cir. 2009). Moreover, simply because magnesite is generic for a mineral does not mean it cannot be generic for other goods.[35] In view of our findings, we hold that MAGNESITA is generic for the Class 19 goods.

Has MAGNESITA acquired distinctiveness?

We turn to the remaining issues in Application Serial No. 85834316, *i.e.*, whether the showing of acquired distinctiveness is sufficient to allow for registration of the merely descriptive term MAGNESITA for the goods or services.[36]

As noted above, in response to the mere descriptiveness refusals, Applicant submitted declarations asserting acquired distinctiveness. "[W]here registration was initially sought on the basis of distinctiveness, subsequent reliance by the applicant on Section 2(f) assumes that the mark has been shown or conceded to be merely descriptive." *Yamaha*, 6 USPQ2d at 1001. Accordingly, Applicant's claim of acquired distinctiveness is a concession that the mark is merely descriptive. *In re Cordua Rests. LP*, 110 USPQ2d 1227, 1233 (TTAB 2014), *aff'd*, *Cordua, Rests, Inc.*, ___ USPQ2d ___. Moreover, Applicant has the burden to establish a *prima facie* case of acquired distinctiveness. *Yamaha*, 6 USPQ2d at 1006.

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[35] In support of its position that MAGNESITA is not generic, Applicant submitted evidence that it found no use of the term MAGNESITA on English language websites. This is not surprising or probative given it is not an English word.

[36] In view of our finding that the applied-for matter is generic for the goods in International Class 19, the refusal of registration must be affirmed. But for completeness we address the alternative issue of whether Applicant's proposed mark is merely descriptive and if it has acquired distinctiveness for those goods.

The amount and character of evidence required to establish acquired distinctiveness depends on the facts of each case and particularly on the nature of the mark sought to be registered. *See Roux Labs., Inc. v. Clairol Inc.*, 427 F.2d 823, 166 USPQ 34, 39 (CCPA 1970). Where a mark is highly descriptive, more evidence is required. *See, e.g., In re Steelbuilding.com,* 75 USPQ2d at 1420 ("[T]he applicant's burden of showing acquired distinctiveness increases with the level of descriptiveness; a more descriptive term requires more evidence of secondary meaning."); *In re Bongrain Int'l Corp.*, 894 F.2d 1316, 13 USPQ2d 1727, 1729 (Fed. Cir. 1990). Based on the evidence discussed above, we find that Applicant's mark is highly descriptive as used in connection with its goods and services.

In support of its assertion of acquired distinctiveness in Application Serial No. 85834315, Applicant submitted:[37] (1) a declaration by Applicant's outside counsel Thomas J. Moore, attesting to substantial and exclusive use since October 1, 2010;[38] (2) a Canadian registration for the mark MAGNESITA;[39] (3) a declaration by Kelly L. Myers, Applicant's General Counsel, attesting to gross sales between 2010 and

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[37] Prior to seeking amendment to the Supplemental Register, Applicant submitted similar evidence in Application Serial No. 77873477: (1) a printout of its website showing its use (February 22, 2013 Response p. 2); (2) its International Registration No. 1050641 for the mark magnesita (February 22, 2013 Response p. 3); (3) a declaration by Kelly L. Myers, Applicant's General Counsel, attesting to substantially exclusive and continuous use in commerce in the United States "at least as early as October 1, 2010" for the goods and "at least as early as May 5, 2011" for the services (September 30, 2013 Response p. 2); (4) a Canadian registration for the mark MAGNESITA (March 14, 2014 Response p. 2); (5) an article from the trade publication *Industrial Minerals* showing Applicant's date of first use dating back to October, 2008 (March 14, 2014 Response p. 4); and (6) a declaration by Kelly L. Myers, attesting to gross sales between 2010 and 2012 (March 14, 2014 Response p. 6).

[38] March 6, 2014 Response p. 4 (App. Serial No. 85834316).

[39] March 6, 2014 Response p. 2 (App. Serial No. 85834316).

2012;[40] (4) an article from the trade publication *Industrial Minerals* showing Applicant's date of first use dating back to October 2008;[41] (5) a declaration by Kelly L. Myers attesting to gross sales in 2014;[42] and (6) a declaration by Thomas J. Moore attesting to Internet searches showing no third-party use of MAGNESITA for refractory products.[43]

While we *may* accept as *prima facie* evidence that a mark has become distinctive, "proof of substantially exclusive and continuous use thereof as a mark by the applicant in commerce for the five years before the date on which the claim of distinctiveness is made," 15 U.S.C. § 1052(f), because the mark is highly descriptive the statement of five years use alone is not sufficient.[44] Evidence of acquired distinctiveness can include the length of use of the mark, advertising expenditures, sales, survey evidence, and affidavits of customers asserting source-indicating recognition.

Despite the substantial gross annual sales, and length of use, there is no evidence of the extent to which the public perceives the term MAGNESITA as indicating source in Applicant.[45] *In re Noon Hour Food Prods., Inc.*, 88 USPQ2d 1172 (TTAB 2008) (despite almost one hundred years of use and cancelled seventy-year old registration for BOND-OST for cheese, evidence insufficient to establish acquired distinctiveness of highly descriptive mark); *Target Brands, Inc. v. Shaun N.G. Hughes*, 85 USPQ2d 1676, 1681 (TTAB 2007) (sales alone without context not sufficient to establish acquired distinctiveness); *In re Candy Bouquet International, Inc.*, 73 USPQ2d 1883, 1889 (TTAB 2004) (sales and length of use not sufficient to establish acquired distinctiveness for highly descriptive term). *See also In re Boston Beer Co. L.P.*, 198 F.3d 1370, 53 USPQ2d 1056 (Fed. Cir. 1999) (claim based on annual sales under the mark of approximately $85 million, and annual advertising expenditures in excess of $10 million, not sufficient to establish acquired distinctiveness in view of highly descriptive nature of mark).

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[40] September 23, 2014 Response p. 2 (App. Serial No. 85834316).

[41] May 6, 2015 Response p. 2 (App. Serial No. 85834316).

[42] May 6, 2015 Response p. 4 (App. Serial No. 85834316).

[43] May 6, 2015 Response pp. 5-48 (App. Serial No. 85834316). A similar declaration with attached exhibits was submitted in Application Serial No. 77873477 for the purpose of showing no generic use of the term MAGNESITA as referenced *infra*. December 17, 2014 Response pp. 2-45.

[44] We note the actual declaration does not attest to five years use prior to the date of the declaration; however, we apply Applicant's later assertions regarding its earlier date of first use to its assertion of substantially exclusive use, which calculates to five and a half years in Application Serial No. 85834316.

In view thereof, based on the totality of the evidence we find that Applicant has not established that MAGNESITA has acquired distinctiveness as a mark for either the refractory goods or the services of "providing information via a global computer network on constructing, maintaining, and repairing refractory apparatus using refractory products" or "providing information via a global computer network on the use of refractory products to construct, maintain and repair refractory apparatus using refractory products; and providing information via a global computer network on the use of mechanical equipment and computer models to construct, maintain and repair refractory installations."

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[45] We note that while Trademark Rule 2.41(a) allows for reliance on prior registrations to prove acquired distinctiveness, the Rule only encompasses prior registrations on the United States Principal Register and does not extend to foreign or international registrations. *Cf. In re Bayer Aktiengesellschaft*, 488 F.3d 960, 82 USPQ2d 1828, 1835 (Fed. Cir. 2007) ("[E]vidence of registration of ASPIRINA in another country is of little value to our analysis of its entitlement to protection in the United States and we cannot say it overcomes the substantial evidence that otherwise supports the Board's decision in this case.").

Summary

In summary, the applied-for matter is generic for refractory products in International Class 19 in Application Serial Nos. 77873477 and 85834316, and in the alternative in Application Serial No. 85834316 it is highly descriptive of the refractory products and the showing for acquired distinctiveness is insufficient. In addition, the applied-for matter is highly descriptive of the services in International Class 37 and the showing for acquired distinctiveness is insufficient in Application Serial No. 85834316.

Decision: The refusals to register Applicant's proposed mark are affirmed in each application. Application Serial No. 85834316 is refused registration in both classes. The goods in International Class 19 in Application Serial No. 77873477 will be deleted and the application will be forwarded for registration of the services in Class 37 on the Supplemental Register.

Trademark Trial and Appeal Board Electronic Filing System. http://estta.uspto.gov

ESTTA Tracking number:	**ESTTA758214**
Filing date:	**07/14/2016**

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

Proceeding	77873477
Applicant	Magnesita Refractories Company
Applied for Mark	MAGNESITA
Correspondence Address	THOMAS J MOORE BACON & THOMAS PLLC 625 SLATERS LN, 4TH FLOOR ALEXANDRIA, VA 22314-1176 UNITED STATES mail@baconthomas.com, tjmoore@baconthomas.com
Submission	Appeal to CAFC
Attachments	MAGN7003_not_appeal_14JUL16.pdf(137632 bytes)
Filer's Name	Thomas J. Moore
Filer's e-mail	mail@baconthomas.com, tjmoore@baconthomas.com
Signature	/Thomas J. Moore/
Date	07/14/2016

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE

Magnesita Refractories Company, Appellant.	Mark: MAGNESITA Application Nos.: 77873477 and 85834316

NOTICE OF APPEAL TO THE CAFC

Magnesita Refractories Company (hereinafter "Appellant") hereby petitions/appeals to the United States Court of Appeals for the Federal Circuit (CAFC) from the decision of the Trademark Trial and Appeal Board ("TTAB") of the United States Patent and Trademark Office entered May 17, 2016, affirming the refusal to register Appellant's trademark "MAGNESITA" regarding the U.S. Trademark Applications listed above. Appellant is dissatisfied with the decision because the TTAB did not reverse the refusal, and the TTAB does not require the filing of a Certificate of Interest as the CAFC does.

In accordance with Rules 15(b)(1) and 25(b)(1) of the Federal Circuit Rules, a Petition for Review will be filed through CM/ECF for the United States Court of Appeals for the Federal Circuit, together with the Court's filing fee of $500. Furthermore, in accord with 37 C.F.R. 2.145 (January 16, 2015) and 104.2 (June 25, 2010), this Notice of Appeal has been served as stated in the following Certificate of Service.

U.S. Application Nos.: 77873477 and 85834316
NOTICE OF APPEAL TO THE CAFC

Respectfully submitted,
Magnesita Refractories Company

Date: July 14, 2016

_______/Thomas J. Moore/__________

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U.S. Application Nos.: 77873477 and 85834316
NOTICE OF APPEAL TO THE CAFC

CERTIFICATE OF SERVICE

The undersigned does hereby certify that on the undersigned date, I caused to be served a copy of the present document by first class U.S. postal mail addressed to the following:

Office of the General Counsel
United States Patent and Trademark Office
P.O. Box 1450
Alexandria, VA 22313-1450

Date: July 14, 2016

_______/Thomas J. Moore/__________
Thomas J. Moore

Trademark Trial and Appeal Board Electronic Filing System. http://estta.uspto.gov

ESTTA Tracking number: **ESTTA758215**

Filing date: **07/14/2016**

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

Proceeding	85834316
Applicant	Magnesita Refractories Company
Applied for Mark	MAGNESITA
Correspondence Address	THOMAS J MOORE BACON & THOMAS PLLC 625 SLATERS LN FL 4 ALEXANDRIA, VA 22314-1169 UNITED STATES mail@baconthomas.com, tjmoore@baconthomas.com, tlee@baconthomas.com
Submission	Appeal to CAFC
Attachments	MAGN7003_not_appeal_14JUL16.pdf(137632 bytes)
Filer's Name	Thomas J. Moore
Filer's e-mail	mail@baconthomas.com, tjmoore@baconthomas.com
Signature	/Thomas J. Moore/
Date	07/14/2016

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE

Magnesita Refractories Company,	Mark: MAGNESITA
Appellant.	Application Nos.: 77873477 and 85834316

NOTICE OF APPEAL TO THE CAFC

Magnesita Refractories Company (hereinafter "Appellant") hereby petitions/appeals to the United States Court of Appeals for the Federal Circuit (CAFC) from the decision of the Trademark Trial and Appeal Board ("TTAB") of the United States Patent and Trademark Office entered May 17, 2016, affirming the refusal to register Appellant's trademark "MAGNESITA" regarding the U.S. Trademark Applications listed above. Appellant is dissatisfied with the decision because the TTAB did not reverse the refusal, and the TTAB does not require the filing of a Certificate of Interest as the CAFC does.

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U.S. Application Nos.: 77873477 and 85834316
NOTICE OF APPEAL TO THE CAFC

Respectfully submitted,
Magnesita Refractories Company

Date: July 14, 2016

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U.S. Application Nos.: 77873477 and 85834316
NOTICE OF APPEAL TO THE CAFC

CERTIFICATE OF SERVICE

The undersigned does hereby certify that on the undersigned date, I caused to be served a copy of the present document by first class U.S. postal mail addressed to the following:

Office of the General Counsel
United States Patent and Trademark Office
P.O. Box 1450
Alexandria, VA 22313-1450

Date: July 14, 2016

_______/Thomas J. Moore/__________
Thomas J. Moore